3-27-2015

State v. Anderson Appellant's Brief Dckt. 41730

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. ARNOLD DEAN ANDERSON, Defendant-Appellant.	NO. 41730 TWIN FALLS COUNTY NO. CR 2013-154 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

HONORABLE RANDY J. STOKER
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

ERIK R. LEHTINEN
Chief, Appellate Unit
I.S.B. #6247

SALLY J. COOLEY
Deputy State Appellate Public Defender
I.S.B. #7353
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

Constitutional Provisions

STATEMENT OF THE CASE

Nature of the Case

Arnold Dean Anderson appeals from the district court's Judgment of Conviction. He asserts that the district court erred in denying his motion to suppress evidence obtained in violation of his right to be free from unreasonable seizures, protected by the Fourth Amendment to the United States Constitution and Article I § 17 of the Idaho Constitution. After being found guilty by a jury of felony possession of a controlled substance, methamphetamine, as well as a persistent violator enhancement, Mr. Anderson was sentenced to ten years, with three years fixed.

On appeal, he asserts that the district court erred when it denied his motion to suppress the fruits of an unlawful search of his vehicle. Mr. Anderson asserts that the totality of the circumstances known to the Officer at the time he searched the vehicle did not yield probable cause because there was no reasonable likelihood that evidence of further criminality would be found. Thus, the State failed to show a valid justification for the warrantless search of the interior of Mr. Anderson's vehicle. Furthermore, Mr. Anderson asserts that the district court abused its discretion by imposing an excessive sentence in light of the mitigating factors that exist in his case, and that the district court erred in failing to reduce his sentence in light of the additional information submitted in conjunction with his Idaho Criminal Rule 35 (*hereinafter,* Rule 35) motion.

Statement of the Facts and Course of Proceedings

At approximately nine o'clock in the evening on January 6, 2013, Officer Joel Woodward saw a car parked at an odd angle, with the front of the vehicle up on the sidewalk. (2/11/13 Tr., p.6, L.7 – p.7, L. 11.) Officer Woodward drove around the block

and came back to determine if the vehicle had been in an accident. (2/11/13 Tr., p.7, Ls.11-16.) As he came back by the place where the vehicle had been parked, the vehicle was moving and was now driving ahead of him. (2/11/13 Tr., p. 7, Ls. 14-19.) Officer Woodward followed the vehicle as it circled the block, and he pulled the vehicle over when the driver failed to signal as it pulled off the road near its original location. (2/11/13 Tr., p.7, L.12 – p.8, L. 11; 4/30/13 Tr., p.187, L.21 – p.188, L.1.) The driver, Arnold Dean Anderson, admitted that he was driving on a suspended license. (2/11/13 Tr., p.8, L.22 – p.9, L. 15.) Mr. Anderson told the officer that he was trying to sell the car and that his passenger was interested in buying the vehicle so he had driven him around the block to give him a chance to see the vehicle in operation. (2/11/13 Tr., p.9, L.16 – p.10, L. 1.)

As Officer Woodward was speaking with Mr. Anderson, he noticed a brown paper bag of the type typically used to store alcohol near the center console. (2/11/13 Tr., p.10, Ls.5-9; 4/5/13 Tr., p.11, Ls.17-22.) He asked Mr. Anderson if there was alcohol in the bag. (2/11/13 Tr., p.10, Ls.10-13; 4/5/13 Tr., p.10, L.25, p.12, Ls.1-2; Suppression Hearing State's Exhibit 1.) Mr. Anderson responded affirmatively. (2/11/13 Tr., p.10, Ls.10-14; 4/5/13 Tr., p.11, L.1, p.12, Ls.1-2; Suppression Hearing State's Exhibit 1.) Officer Woodward asked Mr. Anderson if the bottle of alcohol was open. (4/5/13 Tr., p.11, L.2; Suppression Hearing State's Exhibit 1.) Mr. Anderson then turned to his passenger to ask if the bottle of alcohol was open, and then he told the officer "he said yeah." (4/5/13 Tr., p.28, Ls.8-10; Suppression Hearing State's Exhibit 1 (2:00).) Mr. Anderson took the bottle out of the bag and Officer Woodward observed that the bag contained a bottle of whiskey with the cap on, but the seal on the bottle had

been broken and a portion of the alcohol was missing. (2/11/13 Tr., p.10, Ls.15-22; 4/5/13 Tr., p.12, Ls.10-12; 4/30/13 Tr., p.178, Ls.18-23.) Officer Woodward removed Mr. Anderson from the vehicle and placed him under arrest for driving on a suspended license. (2/11/13 Tr., p.10, L.23 – p.11, L. 3.) Mr. Anderson was handcuffed and placed in Officer Woodward's police car. (2/11/13 Tr., p.11, Ls.2-3; 4/30/13 Tr., p.179, Ls.13-15.) When Officer Woodward was searching Mr. Anderson's vehicle for additional open containers, he opened the driver's side door and saw a small plastic container sitting on the floorboard between the seat and the door. (2/11/13 Tr., p.12, Ls.1-6, p.11, Ls.9-10; Suppression Hearing State's Exhibit 1.) The plastic container was sitting upright and contained a white residue that tested positive for methamphetamine. (2/11/13 Tr., p.14, Ls.6-21.) A baggie containing marijuana was also found in the center console of the vehicle. (2/11/13 Tr., p.11, Ls.9-23.) Mr. Anderson was charged by Information with felony possession of a controlled substance, and with a persistent violator sentencing enhancement. (R., pp.55-57, 91-94.)

On March 19, 2013, Mr. Anderson filed a motion to dismiss and/or a motion to suppress evidence and a memorandum in support. (R., pp.96-103.) Mr. Anderson sought suppression of all evidence obtained as a result of an illegal search of his vehicle. (R., pp.96-103.) A hearing was held on Mr. Anderson's motion to suppress, during which the district court took judicial notice of the preliminary hearing transcript.[1] (4/5/13 Tr.)

The district court ultimately denied Mr. Anderson's motion to suppress finding that the officer had probable cause to search the vehicle for the purpose of finding

additional instrumentalities of the crime of open container. (R., pp.118-126.) The district court noted that the critical inquiry was whether Officer Woodward had probable cause to believe that there were other open containers of alcohol in the vehicle. (R., p.121.) The district court held that, "[g]iven that both [occupants] denied ownership of the bottle of whiskey that was between them near the console, a reasonable and prudent officer would have good reason to believe that there could be other evidence of a crime—another open bottle of alcohol—in the car. Moreover, given this inconsistency, and further given Anderson's hesitation in answering Woodward's question about drugs, a trained officer would have an objective basis to believe there was a 'probability or substantial chance' of other crimes, such as drug possession, in the car."[2] (R., pp.121-122.)

A one day jury trial was held after which the jury found Mr. Anderson guilty of possessing a controlled substance. (4/30/13 Tr., p.255, Ls.19-24; R., p.191.) Mr. Anderson admitted that he had been convicted of two prior felonies and was thus a "persistent violator" pursuant to Idaho Code § 19-2514. (4/30/13 Tr., p.259, L.9 – p.260, L.5.)

---

[1] The district court took judicial notice of the transcript of the preliminary hearing at the outset of the suppression hearing. (4/5/13 Tr., p.6, Ls.10-15.)

[2] The audio recording included a series of questions Officer Woodward asked of Mr. Anderson while he was handcuffing him and frisking him prior to placing him in the police car. (Suppression Hearing State's Exhibit 1.) The officer asked Mr. Anderson if there was anything illegal in the vehicle, and Mr. Anderson responded no. (Suppression Hearing State's Exhibit 1 (11:13-11:14).) Officer Woodward then said, "[t]ook you a while to respond." (Suppression Hearing State's Exhibit 1 (11:14).) This exchange was not identified by either party in the preliminary hearing or the suppression hearing as information contributing to the officer's decision to search the vehicle. The district court apparently learned of this exchange only after reviewing the audio recording sometime after the suppression hearing.

The district court sentenced Mr. Anderson to a unified sentence of ten years, with three years fixed. (R., pp.235-246.) A Judgment of Conviction was entered on November 26, 2013 and an Amended Judgment of Conviction was entered on November 27, 2013. (R., pp.235-246.) On December 3, 2013, Mr. Anderson filed a notice of appeal. (R., pp.247-251, 257-262.)

On March 17, 2014, Mr. Anderson filed a timely *pro se* Rule 35 motion asking the district court to reconsider the sentence it imposed. (On ICR 35 Motion Correction or Reduction of Sentence, attached to the Motion to Augment filed on March 27, 2015.) On April 9, 2013, the district court issued a written order denying Mr. Anderson's I.C.R. 35 motion without a hearing. (Order Denying Defendant's ICR 35 Motion Without a Hearing, attached to the Motion to Augment filed on March 27, 2015.)

ISSUES

1. Did the district court err when it denied Mr. Anderson's motion to suppress?

2. Did the district court abuse its discretion by imposing an excessive sentence upon Mr. Anderson in light of the mitigating factors that exist in this case?

3. Did the district court abuse its discretion when it declined to reduce Mr. Anderson's sentence pursuant to his Idaho Criminal Rule 35 Motion?

ARGUMENT

I.

The District Court Erred When It Denied Mr. Anderson's Motion To Suppress

A. Introduction

Mr. Anderson asserts that Officer Woodward did not have probable cause to search his vehicle. As such, Mr. Anderson's right to be free from unreasonable searches and seizures, protected by the Fourth Amendment to the United States Constitution and Article I § 17 of the Idaho Constitution[3] was violated. Therefore, the district court erred in denying Mr. Anderson's motion to suppress.

B. Relevant Jurisprudence and Standards Of Review

In reviewing an order denying a motion to suppress evidence, Idaho appellate Courts apply a bifurcated standard of review: the Court will accept the trial court's findings of fact, unless they are clearly erroneous, but the Court will freely review the trial court's application of constitutional principles to the facts found. *State v. Purdum,* 147 Idaho 206, 207 (2009).

Warrantless searches are *per se* unreasonable unless they fall within one of a few narrowly drawn exceptions. *Coolidge v. New Hampshire,* 403 U.S. 443, 454-455 (1971). One such exception is the so-called "automobile exception" wherein officers may search a vehicle, or the contents thereof, if probable cause exists to believe that

---

[3] The attorney who presented and argued Mr. Anderson's suppression motion made a general argument under both the Idaho and the United States Constitutions, but did not assert that the Idaho Constitution provides different or increased protection. (R., p.100.) Therefore, Mr. Anderson will rely upon Fourth Amendment jurisprudence in this appeal.

the automobile contains contraband or evidence of a crime. *Carroll v. United States*, 267 U.S. 132 (1925); *California v. Acevedo*, 500 U.S. 565 (1991); *State v. Gallegos*, 120 Idaho 894, 898 (1991). The state may overcome this presumption by demonstrating that a warrantless search either fell within a well-recognized exception to the warrant requirement or was otherwise reasonable under the circumstances. *State v. Weaver*, 127 Idaho 288, 290 (1995). The probable cause necessary to justify a search of an automobile is the same probable cause that is necessary to convince a magistrate to issue a search warrant, that is: facts available to the officer at the time of the search would warrant a person of reasonable caution in the belief that area or items to be searched contained contraband or evidence of a crime. *United States v. Ross*, 456 U.S. 798, 823 (1982); *Texas v. Brown*, 460 U.S. 730, 742 (1983). Probable cause does not require an actual showing of criminal activity, but only the probability or substantial chance of such activity. *Illinois v. Gates*, 462 U.S. 213, 243, n.13 (1983); *State v. Newman*, 149 Idaho 596, 600 (Ct. App. 2010). "Probable cause for a search is a flexible, common-sense standard-a practical, non-technical probability that incriminating evidence is present[.]" *State v. Wigginton,* 142 Idaho 180, 182-83 (2005).

C. The District Court Erred In Denying Mr. Anderson's Motion To Suppress As Mr. Anderson's Purportedly Slow Response Was Insufficient To Establish Probable Cause To Search The Vehicle

The district court erred in denying Mr. Anderson's Motion to Suppress. Mr. Anderson contends that the district court erred in finding that Officer Woodward had reasonable suspicion to believe that Mr. Anderson's vehicle contained evidence of drugs based on what the officer believed was a slow response to his question to Mr. Anderson, "Is there anything illegal in the vehicle?" (Suppression Hearing State's

Exhibit 1 (11:13)). In ruling on Mr. Anderson's motion to suppress, the district court erred when it held that the denials of ownership of the alcohol, combined with Mr. Anderson's slow response to Officer Woodward's question of whether there were drugs in the vehicle, warranted an objective basis to believe there was evidence of other crimes, such as drug possession, in the car.[4] (R., p.122.)

When officers effectuate a traffic stop, the detention of the driver must be based on reasonable suspicion and "must also be reasonably related in scope to the circumstances that justified the stop in the first place." *State v. Johnson*, 152 Idaho 56, 59 (Ct. App. 2011). The Idaho Supreme Court has held it does not necessarily violate the Fourth Amendment for an officer to ask unrelated questions about drugs and weapons during the course of a lawful traffic stop. *State v. Aguirre*, 141 Idaho 560, 563 (2005). However, the duration of a traffic stop cannot be extended once the purpose of the stop is completed. *State v. Gutierrez*, 137 Idaho 647, 650 (Ct. App. 2002). There are two exceptions to this rule. One such exception is present if the officer observes objective, specific, and particular facts to give rise to a particularized suspicion of criminal activity, the purpose of the stop may evolve, allowing the otherwise impermissible extended detention and investigation. *See, e.g., State v. Brumfield*, 136 Idaho 913, 916 (Ct. App. 2001). Further, an officer's explanation for the search is not controlling—the lawfulness of the search is to be evaluated by the court, based upon an objective assessment of the circumstances confronting the officer at the time of the search. *State v. Newman*, 149 Idaho 596, 599 n.1 (Ct. App. 2010).

[4] The State never argued that this exchange contributed to or in any way affected the determination of probable cause to search the vehicle. (*See* 2/11/13 Tr.; 4/5/13 Tr.; R., pp.106-116.)

Particularized suspicion consists of two elements: (1) the assessment must be based on a totality of the circumstances, and (2) the assessment must yield a particularized suspicion that the particular individual being stopped is engaged in wrongdoing. *United States v. Cortez*, 449 U.S. 411, 418 (1981); *State v. Bordeaux*, 148 Idaho 1 (Ct. App. 2009). A mere hunch or unparticularized suspicion on the part of the officer is insufficient to trigger this exception. *See State v. Swindle*, 148 Idaho 61, 64 (Ct. App. 2009).

Although the district court found that the denials of ownership of the bottle of alcohol, combined with Mr. Anderson's slow response to Officer Woodward's question regarding drugs, warranted "an objective basis to believe there was a 'probability or substantial chance' of other crimes, such as drug possession, in the car," such a finding was unreasonable. (R., p.122.) Simply because the driver is slow to respond to an officer's inquiry as to whether there are drugs in the vehicle does not give rise to a reasonable articulable suspicion that the vehicle contains drugs, particularly where the vehicle was pulled over for a traffic violation and the only indication of non-driving criminal activity dealt with alcohol, not drugs. Here, Officer Woodward had only a hunch of criminal activity, which means he could not have had the necessary probable cause to search the vehicle. *See State v. Bishop*, 146 Idaho 804, 819-20 (2008) (discussing officers' hunches and the impropriety of basing searches thereon). Further, Officer Woodward testified that he searched the vehicle for other open containers of alcohol—he did not testify that Mr. Anderson's slow response to his question about illegal items in the car factored into his decision to search the vehicle. (2/11/13 Tr., p.11, Ls.9-10; Suppression Hearing State's Exhibit 1 (11:01).) Nor did the officer testify that, in his

training and experience, a delay or hesitation in responding to a question makes it likely that a person would have contraband in his/her vehicle. (*See* 2/11/13 Tr.; 4/5/13 Tr.)

An objective assessment of the circumstances with which Officer Woodward was confronted at the time of the search did not justify a search of the vehicle. Only two facts were relied upon by the district court in evaluating the totality of the circumstances: (1) both occupants denied ownership of the previously opened container, and (2) Mr. Anderson was slow to respond to the officer's question about drugs. (R., p.122.) Because these facts even when combined, do not equate to substantial and competent evidence of probable cause to believe a crime involving drugs had been or was about to be committed, the district court's conclusion was erroneous.

Further, it is not possible to reconcile the district court's finding of fact with the information contained in the audio recording. The district court mistakenly recalled the question asked by Officer Woodward as a question of whether there were drugs in the car; however, the question was actually, "Is there anything illegal in your vehicle."[5] (Suppression Hearing State's Exhibit 1 (11:11)). Thus, the district court's factual finding was clearly erroneous and unsupported by substantial and competent evidence.

Additionally, it is not possible to reconcile the district court's finding of fact with the actual length of time it took for Mr. Anderson to respond to Officer Woodward's question because there was no noticeable delay. Mr. Anderson took approximately one second to respond to the question. (Suppression Hearing State's Exhibit 1 (11:13)). On

[5] In its Memorandum Opinion, the district court recalled the exchange, "Woodward asked Anderson if there were drugs in the car. He 'hesitated' and responded 'no.'" (R., p.119.) The district court also noted that the exchange took place before Officer Woodward searched the car. (R., p.119, n.1.)

the audio recording, Officer Woodward said, "[t]ook you a while to answer that question"; however, this was an exaggeration. (*See* Suppression Hearing State's Exhibit 1 (11:12-11:13)). Thus, the district court's finding that Mr. Anderson delayed in responding to the question was erroneous.

Assuming *arguendo*, that Mr. Anderson's response was slow, a slow response or hesitation in answering does not constitute probable cause or even reasonable suspicion to believe that Mr. Anderson's car contained drugs or evidence of a crime. In fact, any search pursuant to what Officer Woodward subjectively felt was a slow response to his question was based solely on a hunch, which does not qualify as an exception to the warrant requirement. For example, under *United States v. Wood*, 106 F.3d 942 (10th Cir. 1997), a defendant's nervousness, even combined with his criminal history involving drug use, is insufficient to establish reasonable suspicion. Similarly, in *State v. Henage*, the Idaho Supreme Court held that the frisk was illegal because the defendant's nervous appearance did not justify the search. 143 Idaho 655, 661-62 (2007). In fact, such a reaction was likely due to nervousness, which alone cannot give rise to probable cause or reasonable suspicion. *See United States v. Hall*, 978 F.2d 616 (10th Cir. 1992) (holding nervousness or hesitation when responding to questions did not give rise to reasonable suspicion); *United States v. Lambert*, 46 F.3d 1064 (10th Cir. 1995) (holding defendant's nervous demeanor could have created nothing more than a "hunch" on the part of the agents).

Ultimately, Officer Woodward's description of his suspicion reveals had no more than a "hunch" that Mr. Anderson's vehicle contained drugs, based solely upon the length of time it took Mr. Anderson to respond to a question when Mr. Anderson's

response was not dilatory. (Suppression Hearing State's Exhibit 1 (11:13-11:14)) Thus, the district court's finding of fact is clearly erroneous and not based on substantial and competent evidence.

D. The District Court Erred In Denying Mr. Anderson's Motion To Suppress As Officer Woodward Did Not Have Probable Cause To Believe That Evidence Of Further Criminal Activity Would Be Found In The Vehicle

In denying the motion, the district court found persuasive the fact that both of the vehicle's occupants denied ownership of the previously opened bottle of whiskey located between them. (R., pp.121-122.) Based on this fact, the district court concluded that Officer Woodward had reason to believe another open bottle of alcohol may be found in the car. (R., pp.121-122.) However, denial of ownership of one large, previously opened, container of alcohol does not equate to a reasonable belief that there are multiple open containers of alcohol elsewhere in the vehicle. The district court's determination was erroneous.

The district court found that, "[g]iven that both [occupants] denied ownership of the bottle of whiskey that was between them near the console, a reasonable and prudent officer would have good reason to believe that there could be other evidence of a crime—another open bottle of alcohol—in the car." (R., pp.121-122.) However, such a conclusion does not logically follow this fact. Simply because there are two occupants in a vehicle and both of them deny ownership of an open container found in a brown paper bag between them does not lead to any reason to believe there would be other open containers in the vehicle. That is, one open container does not beget additional open containers. Further, because the open container was of whiskey, it is even less

likely that additional open containers would be found in the vehicle, compared with a situation in which several cans of beer were missing from a six pack.

Merely because there is a previously opened bottle of hard alcohol, in a bag, in the front seat between two occupants, does not give rise to an objectively reasonable belief that the vehicle contains additional bottles of opened alcohol; thus, Officer Woodward's search of the vehicle for additional open containers of alcohol was not objectively reasonable.

E. The District Court Erred In Denying Mr. Anderson's Motion To Suppress

For the reasons stated above, Mr. Anderson asserts that the search of his vehicle was unlawful and, thus, violated his Fourth Amendment and Article I § 17 right to be free from unreasonable searches and seizures. Mr. Anderson asserts that the discovery of the evidence used against him was the product of his unlawful search and should have been suppressed as "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 478-488 (1963). Therefore, Mr. Anderson asserts that the district court abused its discretion by denying his motion to suppress.

II.

The District Court Abused Its Discretion When It Sentenced Mr. Anderson To A Unified Sentence Of Ten Years, With Three Years Fixed, Following His Conviction For Felony Possession Of A Controlled Substance

Mr. Anderson asserts that, given any view of the facts, his unified sentence of ten years, with three 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. Anderson does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Anderson must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* 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.*

In light of Mr. Anderson's rehabilitative potential, the district court abused its discretion in sentencing him excessively. The district court failed to consider the fact that, with programming, Mr. Anderson could likely be successful in the community. (Presentence Investigation Report (*hereinafter,* PSI),[6] p.18.) Notably, the presentencing investigator recommended a retained jurisdiction. (PSI, p.18.)

Mr. Anderson has not had an easy life. Mr. Anderson was verbally and physically abused by both of his parents. (PSI, p.13.) He left home at age twelve and rode trains to different states and worked in fields to provide for himself. (PSI, pp.13, 18.)

[6] References to the "PSI" shall include the entire electronic file, including all attachments such as letters in support, substance abuse evaluations.

However, Mr. Anderson values his children and enjoys spending time with his grandchildren. (PSI, pp.13-14, 17.) Further, he has the support of members of his community. (PSI, p.42.) The fact that Mr. Anderson has strong support from family members and friends should have received the attention of the district court. *See State v. Shideler*, 103 Idaho 593, 594-595 (1982) (reducing sentence of defendant who had the support of his family and employer in his rehabilitation efforts).

Based upon the above mitigating factors, Mr. Anderson 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 difficult childhood and his dedication to his family, it would have imposed a less severe sentence.

III.

The District Court Abused Its Discretion When It Declined To Reduce Mr. Anderson's Sentence In Light Of The New Information Offered In Support Of His Rule 35 Motion

In Mr. Anderson's Rule 35 motion, he asked the district court to correct or reduce his sentence. (On ICR 35 Motion Correction or Reduction of Sentence, p.1, attached to the Motion to Augment filed on March 27, 2015.) In support of his Rule 35 motion, Mr. Anderson submitted several documents regarding his case.

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). "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.* "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).

In his Rule 35 motion, Mr. Anderson informed the court that the prosecutor's statements during the sentencing hearing regarding his failure to comply with an order to complete a court compliance program were untrue, as Mr. Anderson was never ordered to complete the program. (On ICR 35 Motion Correction or Reduction of Sentence, p.2, attached to the Motion to Augment filed on March 27, 2015.) Mr. Anderson asked the district court to consider the importance of his grandchildren to him. (On ICR 35 Motion Correction or Reduction of Sentence, p.4, attached to the Motion to Augment filed on March 27, 2015.) Further, Mr. Anderson advised the district court that he was concerned that the apartment complex he had worked hard to renovate and clean up would be lost if he were incarcerated for a lengthy period of time. (On ICR 35 Motion Correction or Reduction of Sentence, pp.3-4, attached to the Motion to Augment filed on March 27, 2015.) However, the district court denied Mr. Anderson's motion without a hearing. (Order Denying Defendant's ICR 35 Motion Without a Hearing, pp.1-6, attached to the Motion to Augment filed on March 27, 2015.) Mr. Anderson asserts that the district court's refusal to reduce his sentence represents an abuse of discretion.

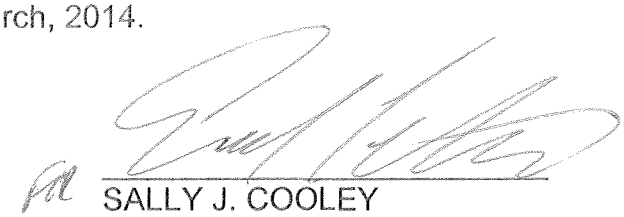
In addition to the new information provided in his Rule 35 motion, the district court was aware of other mitigating circumstances, as set forth in Section II. Based on

the foregoing, in addition to the mitigating evidence before the district court at the time of sentencing, it is clear the district court abused its discretion in failing to reduce Mr. Anderson's sentence in response to his Rule 35 motion.

CONCLUSION

For the reasons set forth herein, Mr. Anderson respectfully requests that this Court vacate the district court's judgment of conviction and reverse the order which denied his motion to suppress. Alternatively, he respectfully requests that this Court reduce his sentence or vacate his conviction and remand this matter for a new sentencing hearing.

DATED this 27th day of March, 2014.



SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of March, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

ARNOLD D ANDERSON
INMATE #108036
SICI
PO BOX 8509
BOISE ID 83707

RANDY J STOKER
DISTRICT COURT JUDGE
E-MAILED BRIEF

BENJAMIN P ANDERSEN
TWIN FALLS COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.

EVAN A. SMITH
Administrative Assistant

SJC/eas