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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 47637-2019
Plaintiff-Respondent,	)	
	)	Kootenai County Case No.
v.	)	CR28-19-10439
	)	
ROBERT MICHAEL DAVIS,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

ISSUES

1. Has Davis failed to show that the district court abused its sentencing discretion when it imposed a unified sentence of five years, with two years fixed, upon his conviction for possession of methamphetamine?
2. Has Davis failed to show that the district court abused its discretion when it denied his Idaho Criminal Rule 35 motion?

## ARGUMENT

### I.

#### Davis Has Failed To Show That The District Court Abused Its Sentencing Discretion

##### A. Introduction

A police officer conducted a traffic stop on the car Davis was driving. (R., p.13.<sup>1</sup>) Davis admitted that he was on probation and consented to a search of his person. (R., p.13.<sup>2</sup>) The officer discovered a small bag in Davis's pocket that contained methamphetamine residue. (R., pp.13-14.) The officer then searched the car and discovered multiple items of paraphernalia, including a syringe loaded with methamphetamine. (R., p.14.) Davis was arrested and charged with possession of a controlled substance, possession of paraphernalia, and a persistent violator enhancement. (R, pp.53-54; see R., pp.70, 79; 9/3/19 Tr., p.4, L.15 – p.5, L.9.)

Pursuant to a plea agreement, Davis pled guilty to possession a controlled substance. (R., p.68; 9/3/19 Tr., p.10, Ls.18-22.) The state moved to dismiss the charge of possession of paraphernalia and the persistent violator enhancement. (R., pp.70-71, 79-80; 9/3/19 Tr., p.4, L.15 – p.5, L.9.) The district court imposed a unified sentence of five years, with two years fixed. (R. pp.81-83; 11/4/19 Tr., p.27, L.1 – p.29, L.5.) Davis timely appealed. (R., pp.84-87, 97-100.)

##### B. Standard Of Review

The length of a sentence is reviewed under an abuse of discretion standard considering the defendant's entire sentence. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007) (citing State v. Strand, 137 Idaho 457, 460, 50 P.3d 472, 475 (2002); State v. Huffman, 144 Idaho 201, 159 P.3d 838 (2007)). It is presumed that the fixed portion of the sentence will be the defendant's

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<sup>1</sup> The state adopts the Appellant's citation designations.

<sup>2</sup> Although he did not mention it to the officer, Davis was also on parole at the time of the traffic stop. (11/4/19 Tr., p.25, L.11 – p.26, L.4.)

probable term of confinement. Id. (citing State v. Trevino, 132 Idaho 888, 980 P.2d 552 (1999)). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. State v. Baker, 136 Idaho 576, 577, 38 P.3d 614, 615 (2001) (citing State v. Lundquist, 134 Idaho 831, 11 P.3d 27 (2000)). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine whether the lower court: (1) perceived the issue as one of discretion; (2) acted within the boundaries of such discretion; (3) acted consistently with any legal standards applicable to the specific choices before it; and (4) reached its decision by an exercise of reason. State v. Herrera, 164 Idaho 261, 270, 429 P.3d 149, 158 (2018) (citation omitted).

C. Davis Has Shown No Abuse Of The District Court's Sentencing Discretion

To carry the burden of demonstrating an abuse of discretion, the appellant must establish that, under any reasonable view of the facts, the sentence was excessive. State v. Farwell, 144 Idaho 732, 736, 170 P.3d 397, 401 (2007). In determining whether the appellant met this burden, the court considers the entire sentence but, because the decision to release the defendant on parole is exclusively the province of the executive branch, presumes that the determinate portion will be the period of actual incarceration. State v. Bailey, 161 Idaho 887, 895, 392 P.3d 1228, 1236 (2017) (citing Oliver, 144 Idaho at 726, 170 P.3d at 391). To establish that the sentence was excessive, the appellant must demonstrate that reasonable minds could not conclude the sentence was appropriate to accomplish the sentencing goals of protecting society, deterrence, rehabilitation, and retribution. Farwell, 144 Idaho at 736, 170 P.3d at 401. ““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.”” Bailey, 161 Idaho at 895-96, 392 P.3d at 1236-37 (quoting State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2015)).

Here, the imposed sentence fits within the statutory limits. The maximum penalty for possession of methamphetamine is seven years. I.C. § 37-2732(c)(1). Davis concedes that his unified five-year sentence does not exceed the statutory maximum. (Appellant's brief, p.3.) Thus, he "must show that the sentence, in light of the governing criteria, is excessive under any reasonable view of the facts." Strand, 137 Idaho at 460, 50 P.3d at 475. He cannot do so.

Davis's sentence is reasonable as a matter of the district court's discretion. In imposing Davis's sentence, the district court reviewed Davis's criminal history in detail. (11/4/19 Tr., p.23, L.13 – p.26, L.22.) The court found that all of his convictions involved controlled substances. (11/4/19 Tr., p.28, Ls.8-10; see PSI, pp.6-8.) Davis's first conviction was for misdemeanor possession of a controlled substance. (PSI, p.6.) His second conviction was for possession of methamphetamine, a felony. (PSI, pp.6-7; 11/4/19 Tr., p.23, Ls.13-17.) He was placed on probation in that case. (11/4/19 Tr., p.23, Ls.18-19.) Davis violated his probation when he was again convicted of felony possession of a controlled substance. (11/4/19 Tr., p.23, Ls.20-24; see PSI, p.7.) The court retained jurisdiction in his second felony possession case. (11/4/19 Tr., p.23, L.25 – p.24, L.2.) Davis completed a rider and was placed on another period of probation, but he was eventually sent to prison and then paroled. (11/4/19 Tr., p.23, L.22 – p.24, L.22.) After being released from prison, Davis was convicted of felony possession of a controlled substance for the third time thereby violating his parole. (PSI, p.7; 11/4/19 Tr., p.24, L.23 – p.25, L.4.) Davis was again placed on probation. (11/4/19 Tr., p.25, L.15 – p.26, L.8.) While Davis was on parole for felony possession of a controlled substance in one case and on probation for felony possession of a controlled substance in another, he was charged with possession of methamphetamine in this case. (R., pp.53-54; 11/4/19 Tr., p.25, L.23 – p.26, L.22.)

Additionally, the court explained and then applied the four goals of sentencing in light of Davis's criminal history and ongoing drug use. (11/4/19 Tr., p.27, Ls.1-15.) The court acknowledged the "rehabilitative things" that Davis was doing to address his drug use. (11/4/19 Tr., p.28, Ls.18-20.) However, given Davis's failure to successfully complete several periods of probation and parole, and considering his "chronic and ongoing" use of illicit substances the court found that it could not justify another probation and also found no utility in placing him on another rider. (11/4/19 Tr., p.28, Ls.8-17.) Therefore, the court determined that those rehabilitative measures were "simply going to have to be done on parole." (11/4/19 Tr., p.28, Ls.20-21.)

Furthermore, the court found that possession of a controlled substance was not a victimless crime, but "a scourge in our community" and "a severe problem in many other communities around our country." (11/4/19 Tr., p.27, Ls.21-25.) In order to protect society, to deter and punish Davis, and to deter others, the court concluded that it could not allow him to "pick up new felonies, get probations, pick up new felonies, get probations." (11/4/19 Tr., p.28, L.25 – p.29, L.5.) Because the court expressly considered the goals of sentencing in light of Davis's criminal history, ongoing drug use, and the need to protect society, the district court did not abuse its discretion when it imposed a unified five-year sentence, with two years fixed, rather than retain jurisdiction or place Davis on probation.

Davis erroneously argues his sentence is excessive because "the district court failed to properly consider the mitigating factors that exist in his case." (Appellant's brief, p.4.) Specifically, Davis argues that the court "failed to give proper consideration to his admitted substance abuse problem," his "desire for treatment," and his "expressed ... remorse for committing the instant offense." (Appellant's brief, pp.4-5.) His argument lacks merit.

The record belies the contention that the district court did not properly consider Davis's substance abuse problem, his desire for treatment, and his remorse. After reviewing Davis's criminal history in detail during the sentencing hearing, the court found that Davis's relationship with drugs was "chronic and ongoing." (11/4/19 Tr., p.28, Ls.8-10.) The court applauded "the good things" and the "rehabilitative things" that Davis had undertaken to address his ongoing drug use after his arrest. (11/4/19 Tr., p.28, Ls.18-20.) However, in determining the proper amount of mitigating weight to assign to Davis's rehabilitative efforts, the court concluded that the need for rehabilitation was subordinate to the other goals of sentencing. (11/4/19 Tr., p.28, L.18 – p.29, L.5.) It is well-within the district court's discretion to weigh the different objectives of sentencing and give them differing weights. See State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (holding the district court did not abuse its discretion in concluding that the objectives of punishment, deterrence, and protection of society outweighed the need for rehabilitation). Thus, the court acted well within its discretion when it concluded that the protection of society, the need to punish and deter Davis, and the need to deter others took priority over Davis's rehabilitation.

Davis also argues that the court failed to properly consider the fact that he had a "job waiting for him upon release." (Appellant's brief, p.5.) However, during the sentencing hearing Davis's trial counsel did not present any information about potential employment opportunities as mitigating evidence. (9/3/19 Tr., p.21, L.1 – p.23, L.11.) Furthermore, when given the opportunity to speak in mitigation of punishment, Davis declined. (9/3/19 Tr., p.18, Ls.9-14.) Notwithstanding the fact that neither Davis nor his counsel presented information about his potential employment opportunities if he were released on community supervision, such information was contained in the PSI, which the court plainly considered. (9/3/19 Tr., p.13, Ls.1-16; 11/4/19 Tr., p.17, Ls.15-20; p.18, L.23 – p.19, L.19; p.21, Ls.2-15; p.23, Ls.12-17.)

In sum, the district court acted reasonably and well within its discretion when it imposed a unified sentence of five years with two years fixed.

## II.

### Davis Has Failed Show That The District Court Abused Its Discretion When It Denied His Rule 35 Motion

#### A. Introduction

Davis filed a Rule 35 motion to reduce his sentence. (R., pp.94-96.) During the hearing on his motion, Davis testified that he had completed a “[f]aith-based one-step recovery program,” and that he intended to complete a sixteen month, 24/7 program, which he had been participating in prior to being sentenced. (2/21/2020 Tr., p.6, L.24 – p.9, L.6.) Davis requested a period of retained jurisdiction. (R., p.95.) Alternatively, he request the court increase the fixed portion of his sentence from two years to three and a half years and decrease the indeterminate period of incarceration from three years to zero. (R., p.95; 2/21/2020 Tr., p.9, Ls.7-13; p.13, Ls.1-3.) The district court denied his motion. (2/21/2020 Tr., p.14, L.4 – p.15, L.18; Augmentation: Order Denying Defendant’s Rule 35 Motion.)

#### B. Standard Of Review

“If a sentence is within the statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and we review the denial of the motion for an abuse of discretion.” Huffman, 144 Idaho at 203, 159 P.3d at 840; see also State v. Anderson, 163 Idaho 513, 517, 415 P.3d 381, 385 (Ct. App. 2015) (“A motion for reduction of sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court.”). In conducting a review of the denial of a Rule 35 motion, the Court considers the entire record and applies the same criteria

used for determining the reasonableness of the original sentence. Anderson, 163 Idaho at 517, 415 P.3d at 385.

C. The District Court Did Not Abuse Its Discretion When It Denied Davis's Rule 35 Motion

Davis has failed to show that the district court abused its discretion when it denied Davis's Rule 35 motion. To prevail on appeal, Davis "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. Brunet, 155 Idaho 724, 729, 316 P.3d 640, 645 (2013) (internal quotations omitted). Davis claims he presented new information in the form of his testimony at the Rule 35 hearing. (Appellant's brief, p.6.) Davis's intention to continue treatment following his term of imprisonment was not new information because his trial counsel informed the court during the sentencing hearing that he was in "the 24/7 program," that he was "doing well," and that he still had about fourteen months of programming to complete. (11/4/19 Tr., p.21, L.23 – p.22, L.3.) Cognizant of the fact that Davis desired to continue treatment, the court stated that he could continue his rehabilitation "on parole." (11/4/19 Tr., p.28, Ls.18-21.)

Even if new, the evidence shows no abuse of discretion. In denying Davis's Rule 35 motion, the court maintained that imposition of the original sentence was the best way to achieve the four goals of sentencing. (2/21/2020 Tr., p.14, L.4 – p.15, L.12.) The court determined that granting Davis's request for a reduced sentence would not meet the goals of sentencing, especially protecting society and rehabilitation. (2/21/20 Tr., p.15, Ls.3-16.) Given Davis's history of failed probations and his demonstrated inability to maintain sobriety while on community supervision, his completion of the one-step recovery program while in custody only reinforced the district court's rationale. Accordingly, the district court did not abuse its discretion by denying her Rule 35 request for probation.



CONCLUSION

The state respectfully requests this Court to affirm the judgment of conviction and the order denying Davis's Rule 35 motion.

DATED this 4th day of August, 2020.

/s/ Justin R. Porter  
JUSTIN R. PORTER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4th day of August, 2020, served a true and correct copy of the foregoing RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

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/s/ Justin R. Porter  
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