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### State v. Colbray Appellant's Brief Dckt. 47969

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 47969-2020
Plaintiff-Respondent,	)	
	)	ADA COUNTY NO. CR01-17-40344
v.	)	
	)	
TONY LEE COLBRAY,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	
_____	)	

STATEMENT OF THE CASE

Nature of the Case

Tony Colbray pled guilty to one count of possession of heroin with intent to distribute, and was sentenced to fifteen years, with four years fixed. Mr. Colbray appeals, asserting the district court abused its discretion when it imposed an excessive sentence, and when it denied his Rule 35 motion. Specifically, he contends the district court erred by failing to place him on probation.

## Statement of the Facts & Course of Proceedings

Initially, a complaint was filed charging Mr. Colbray with one count of possession of heroin with intent to deliver. (R., pp.10-11.) However, a superseding indictment was later filed, charging one count of conspiracy to traffic heroin, one count of possession of heroin with intent to deliver, one count of possession of drug paraphernalia with intent to deliver, and one count of misdemeanor possession of drug paraphernalia. (Aug., p.1.)<sup>1</sup> The State then moved to file a persistent violator enhancement. (R., pp.36-37.)

Pursuant to a plea agreement, Mr. Colbray pled guilty to one count of aiding and abetting possession of heroin with intent to deliver. (R., p.61; Tr., p.8, Ls.22-23.) In exchange for Mr. Colbray's guilty plea, the State agreed to dismiss the other charges, and would not pursue the persistent violator enhancement. (R., p.61.) On the day the court accepted Mr. Colbray's guilty plea, he waived a presentence investigation and elected to proceed immediately to sentencing. (*See* Tr., p.35, L.11 – p.36, L.3.) The State gave no specific sentencing recommendation, instead asking the court to “impose . . . whatever sentence it feels would be appropriate to deter the defendant.” (Tr., p.41, Ls.20-22.) Both Mr. Colbray and his attorney asked the court for probation. (Tr., p.46, Ls.12-15; p.58, Ls.4-5.) The court imposed a unified sentence of fifteen years, with four years fixed. (R., pp.62-64; Tr., p.68, Ls.15-18.)

Mr. Colbray timely filed a Rule 35 motion from the judgment of conviction. (R., pp.68-86.) In that motion, Mr. Colbray asked the court “to reduce his sentence to two years (2) fixed followed by eight (8) years indeterminate.” (R., p.69.) The court denied that motion, stating it believed the “sentence was reasonable at the time that it was imposed, and there are no grounds for additional leniency.” (R., p.91.)

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<sup>1</sup> A motion to augment has been filed together with this brief.

The original judgment of conviction was entered on July 30, 2018. (R., pp.62-64.) No notice of appeal was filed within 42 days. However, pursuant to a grant of post-conviction relief in Ada County case CV01-19-07794, the Judgment of Conviction was re-entered on April 3, 2020. (R., pp.102-04.) A Notice of Appeal was then timely filed from the re-entered Judgment of Conviction. (R., pp.106-08.)

### ISSUES

- I. Did the district court abuse its discretion when it imposed a unified sentence of fifteen years, with four years fixed, upon Mr. Colbray following his plea of guilty to possession of a controlled substance with intent to deliver?
- II. Did the district court abuse its discretion when it denied Mr. Colbray's Rule 35 Motion?

### ARGUMENT

#### I.

#### The District Court Abused Its Discretion When It Imposed A Unified Sentence Of Fifteen Years, With Four Years Fixed, Upon Mr. Colbray Following His Plea Of Guilty To Possession Of A Controlled Substance With Intent To Deliver

##### A. Introduction

Mr. Colbray asserts that, given any view of the facts, his sentence of fifteen years, with four years fixed, is excessive. Specifically, he asserts that had the district court given the substantial amount of mitigating evidence in the record its proper weight, the court should have placed him on probation.

##### B. Standard Of Review

There are "four objectives of criminal punishment: (1) protection of society, (2) deterrence of the individual and the public generally, (3) possibility of rehabilitation, and (4) punishment or retribution for wrongdoing." *State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982).

However, “the primary consideration is the good order and protection of society, [and a]ll other factors must be subservient to that end.” *Id.* (internal quotation marks and citations removed). Even so, Idaho law prefers avoiding imprisonment for defendants, providing that, “The sentencing court *should first consider placement in the community.*” I.C. § 19-2521(1)(a) (emphasis added).

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 (1979)).

When this Court reviews an alleged abuse of discretion by a trial court the sequence of inquiry requires consideration of *four* essentials. 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) (emphasis in original).

In this case, Mr. Colbray contends the district court abused its discretion by failing to exercise reason in its ultimate sentencing decision. “[R]easonableness is a fundamental requirement.” *State v. Nice*, 103 Idaho 89, 90 (1982). “[R]easonableness’ implies that a term of confinement should be tailored to the purposes for which the sentence is imposed.” *Toohill*, 103 Idaho at 568.

C. The District Court Did Not Give Sufficient Weight To Mitigating Factors That Should Have Led It To Place Mr. Colbray On Probation

Mr. Colbray asserts that, given any view of the facts, the sentence imposed by the district court is excessive, particularly in light of the mitigating evidence presented. *See State v. Strand*, 137 Idaho 457, 460 (2002) (noting that when reviewing a sentence, Idaho’s appellate courts will

“review the record on appeal, having due regard for the nature of the offense, *the character of the offender*, and the protection of the public interest”) (emphasis added). The record in this case reflects a wealth of mitigating evidence that should have weighed in favor of the court placing Mr. Colbray on probation, including his honesty and acceptance of responsibility for his actions, his willingness and need to support his family, and the support he had from his family. Mr. Colbray asserts that, had the district court given that mitigating evidence its proper weight, the district court should have been led to place him on probation. By executing a lengthy prison sentence instead, Mr. Colbray asserts the district court did not exercise reason and, therefore, abused its discretion.

Mitigating factors to be considered by the sentencing court include a defendant who has “expressed contrition and repentance over his involvement with [certain] drug transactions.” *State v. Baiz*, 120 Idaho 292, 293 (Ct. App. 1991) Courts have shown leniency and reduced sentences for defendants who have “accepted responsibility for [their] acts.” *State v. Shideler*, 103 Idaho 593, 594 (1982); *see also State v. Carrasco*, 114 Idaho 348, 354-55 (Ct. App. 1988) (apparently treating as mitigation the fact that the defendant “acknowledged the wrongfulness of the transaction [drug sale] and he openly expressed contrition for his acts”), *reversed on other grounds*, 117 Idaho 295 (1990)). This is especially true when the defendant has taken “full responsibility for his actions, and did not blame the victims in any way.” *State v. Jackson*, 130 Idaho 293, 295-96 (1997).

Mr. Colbray has been honest and expressed contrition for his actions throughout these proceedings. His attorney vouched for him (while saying, “I have never vouched for clients”) and called him “one of the most honest people” she had worked with. (Tr., p.47, Ls.3-18.) Mr. Colbray admitted that he had “kind of built a platform for five days for [his co-defendant] to

sell her drugs and me transport her.” (Tr., p.57, Ls.2-3.) He told the court that he “should have used [his] better sense” when he realized what his co-defendant was doing. (Tr., p.56, Ls.14-15.) He told the court, “I made a whole bunch of mistakes. My mistake here is maybe I should have opened my mouth. I should have said, ‘Hey, lookit,’ [sic] instead of actually condoning. That’s what I call it, is I condoned an illegal act and I kind of helped it along the way.” (Tr., p.57, L.20 – p.58, L.1.)

Other mitigating evidence can include a defendant who “was working and helping to support his children at the time of the conviction.” *State v. Nice*, 103 Idaho 89, 91 (1982). The support of the defendant’s family is another mitigating factor to be considered. *Shideler*, 103 Idaho at 595 (reducing sentence of defendant who, *inter alia*, had the support of his family and his employer); *see also Baiz*, 120 Idaho at 293 (treating the fact that the defendant “had considerable family support and was well liked by his friends” as mitigating).

Mr. Colbray wants – and needs – to support a family of “nine kids, [and] 26 grandkids.” (Tr., p.53, L.24.) He was in the process of helping start a private car rental company in Oregon. (*See generally* Tr., p.44, L.22 – p.45, L.9; p.53, L.18 – p.57, L.11.) Mr. Colbray was in Idaho to buy a car, and the cash found on him when he was arrested was to be used for that purpose. (*See* Tr., p.45, Ls.4-9.) His attorney told the court that his partner in that car rental business was prepared to testify on Mr. Colbray’s behalf at trial. (Tr., p.44, L.22 – p.45, L.9.)

Mr. Colbray asserts the record shows his acceptance of responsibility for his actions, his need to support his family, and their continued support. Mr. Colbray asserts all of this mitigating evidence should have led the district court to place him on probation. Accordingly, Mr. Colbray asserts the district court did not exercise reason when it imposed a fifteen-year sentence, with four years fixed, and thus abused its discretion.

## II.

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

#### A. Introduction

Mr. Colbray asserts the district court abused its discretion when it denied his Rule 35 Motion. Specifically, he asserts the district court did not adequately consider the new evidence he presented with his motion; and, had the district court properly considered that evidence, it would have been led to grant his 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.” *State v. Huffman*, 144 Idaho 201, 203 (2007). That discretionary decision is reviewed for the four factors discussed in *Lunneborg*, 163 Idaho at 863.

“Where an appeal is taken from denial of a Rule 35 motion, our scope of review includes all information presented at the original sentencing hearing and at a subsequent hearing on the motion.” *State v. Lopez*, 106 Idaho 447, 450 (Ct. App. 1984). “The criteria for evaluating rulings on motions to reduce sentences under Rule 35 are the same as those applied in determining whether the original sentence was reasonable.” *State v. Forde*, 113 Idaho 21, 22 (Ct. App. 1987). “The defendant bears the burden of showing that the sentence is unreasonably harsh in light of the primary objective of protecting society and the related goals of deterrence, rehabilitation and retribution.” *State v. Hoskins*, 131 Idaho 670, 672 (Ct. App. 1998).

“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).

C. Mr. Colbray's Conduct While Incarcerated Should Have Led The Court To Reduce His Sentence

When considering a Rule 35 motion, “the district court may consider facts presented at the original sentencing as well as any other information concerning the defendant’s rehabilitative progress while in confinement.” *State v. Barreto*, 122 Idaho 453, 455 (Ct. App. 1992). In addition to progress towards rehabilitation, the court may also consider the defendant’s “post-sentencing conduct.” *State v. McNeil*, 155 Idaho 392, 403 (Ct. App. 2013); *see State v. Sanchez*, 117 Idaho 51, 52 (Ct. App. 1990) (considering evidence of “good conduct while in prison” as being “worthy of consideration” in support of a Rule 35 motion.); *State v. Snapp*, 113 Idaho 350, 351 (Ct. App. 1987) (considering as mitigating evidence the fact “that [the defendant’s] conduct was good, and that he earned a high school equivalency certificate, while in prison”).

Mr. Colbray’s motion described how he is “housed as a volunteer worker in Maximum Security,” and his “lack of disciplinary matters and otherwise good behavior since his incarceration at the Ada County Jail.” (R., pp.68-69.) Mr. Colbray testified during the sentencing hearing that he had been held at the Ada County jail for “300-some days” while awaiting his trial; during that time, he said, “I don’t have one write-up. There’s not one officer that can tell you that I’m not very respectful. I’m trustworthy. I’m honest.” (Tr., p.58, Ls.14-17.) Mr. Colbray included two letters from himself with his motion (*see* R., pp.71-84), which the court described as expressing his “desire to become a positive influence on others,” along with “describing [his] volunteer work and other positive activities since being sentenced” (R., p.90). A letter to the court from Mr. Colbray’s brother in support of his Rule 35 Motion was also included with that motion. (R., pp.85-86.) In that letter, his brother told the court that Mr. Colbray “has a lot of family that is pulling for him.” (R., p.86.) He also described Mr. Colbray’s work towards establishing a business and how Mr. Colbray was trying to be a better example for his youngest

child. (*See R.*, pp.85-86.) Accordingly, Mr. Colbray asserts the court abused its discretion when it denied his Rule 35 motion.

CONCLUSION

Mr. Colbray respectfully requests that this Court remand his case to the district court with instructions that he is to be placed on probation. Alternatively, Mr. Colbray respectfully requests that this Court vacate the denial of his Rule 35 Motion and remand his case for further proceedings.

DATED this 11<sup>th</sup> day of August, 2020.

/s/ Erik R. Lehtinen  
ERIK R. LEHTINEN  
Chief, Appellate Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11<sup>th</sup> day of August, 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](mailto:ecf@ag.idaho.gov)

/s/ Evan A. Smith  
EVAN A. SMITH  
Administrative Assistant

ERL/eas