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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 48169-2020
Plaintiff-Respondent,)	
)	KOOTENAI COUNTY NO. CR28-19-16759
v.)	
)	
KORDELL ANTON MALLAK,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Kordell Anton Mallak appeals from the district court's Order Denying Defendant's Rule 35 Motion. Mr. Mallak was sentenced to a unified sentence of ten years, with five years fixed, for his trafficking in heroin conviction. He asserts that the district court abused its discretion by denying his Rule 35 motion for a reduction of sentence.

Statement of the Facts & Course of Proceedings

Mr. Mallak and Ms. Flohr were stopped for failing to properly signal. (R., p.9.) While Ms. Flohr was attempting to locate her driver's license, Officer Scotch saw a bong in the

backseat. (R., p.9.) After further investigation, officers located heroin, prescription pills, methamphetamine, marijuana, and drug paraphernalia in the vehicle. (R., pp.9-11.) On October 23, 2019, an Information was filed charging Mr. Mallak with trafficking in heroin, possession with the intent to deliver a controlled substance (methamphetamine), and possession of drug paraphernalia. (R., pp.43-45.)

Mr. Mallak entered a guilty plea to the amended charge of trafficking in heroin and the remaining charges were dismissed. (R., pp.47, 50-51, 57.) He waived his right to a presentence investigation report and immediately proceed to sentencing. (R., p.47.) Both parties recommended a unified sentence of ten years, with five years fixed. (Tr., p.16, Ls.9-12, p.18, Ls.22-23.) The district court imposed the requested sentence. (R., pp.54-55.)

Mr. Mallak filed a timely Motion for Modification of Sentence Pursuant to I.C.R. 35(b). (R., pp.59-68, 75-82.) Despite compelling arguments in support of the motion, the motion was denied. (R., p.88.) Mr. Mallak filed a Notice of Appeal timely from the district court's Order Denying Defendant's Rule 35 Motion. (R., pp.90-92.)

ISSUE

Did the district court abuse its discretion when it denied Mr. Mallak's Idaho Criminal Rule 35 Motion for a Reduction of Sentence?

ARGUMENT

The District Court Abused Its Discretion When It Denied Mr. Mallak's Rule 35 Motion For A Reduction Of Sentence

A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court, and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe. *State v. Trent*, 125 Idaho 251, 253 (Ct. App.

1994) (citing *State v. Forde*, 113 Idaho 21 (Ct. App.1987) and *State v. Lopez*, 106 Idaho 447 (Ct. App. 1984)). “The criteria for examining rulings denying the requested leniency are the same as those applied in determining whether the original sentence was reasonable.” *Id.* (citing *Lopez*, 106 Idaho at 450).

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)). In order to show an abuse of discretion, Mr. Mallak must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992)). “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).

Appellate courts use a four-part test for determining whether a district court abused its discretion: Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason. *Lunneborg v. My Fun Life*, 163 Idaho 856, 863 (2018). Mr. Mallak asserts that the district court failed to give proper weight and consideration to the new information provided in support of his Rule 35 motion and the mitigating factors that exist in his case and, as a result, did not reach its decision by an exercise of reason.

Mr. Mallak provided additional information in support of his Rule 35 motion. Specifically, he attached documentation to his motion showing that he was eligible for treatment

in Rimrock's True North program, an eight-month re-entry program designed to help offenders re-entering society after a period of incarceration in Billings, Montana. (R., pp.65-67, 75-79.) Idaho courts have previously recognized that substance abuse and a desire for treatment should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982).

In *State v. Shideler*, 103 Idaho 593, 594 (1982), the Idaho Supreme Court noted that family and friend support were factors that should be considered in the Court's decision as to what is an appropriate sentence. Mr. Mallak's parents wrote a letter of support for their son and noted that they were willing to support him in overcoming his drug addiction:

We are writing to support our son Kordell Mallak. He is currently sentenced to the Idaho Correctional Facilities in Boise, Idaho.

We are expressing our deepest support and are willing and able, emotionally and financially to assist him in rehabilitating into society as a productive member of our community. Kordell is a highly intelligent and talented young man that has been plagued by addiction, the same drug fueled addictions that have negatively impacted so many young adults in our country. He has the ability, the determination now and we believe is repentant and aware of his actions that led him to be incarcerated.

We hope and pray that leniency will be granted, and he will be given the opportunity to prove his commitment and determination to overcome drug addiction. It is our profound belief that when he receives proper treatment and given a second chance to improve his life, his health and his financial position in life, that his past mistakes will only serve to strengthen his resolve and help anyone he meets in life to be an instrument of inspiration.

The crimes he has committed are mostly against himself, and yes, he broke the law and engaged in dangerous drugs. While under the influence of drugs and bad participants, he made terrible choices. Now, of being sober mind, he has demonstrated a higher intelligence, understanding, and full responsibility of what led him to this terrible place in life. He alone is responsible, and he alone must demonstrate with strong action that he is ready to embrace the truer person he is and improve himself to a better place in life.

Please support Kordell and help him improve with sound judgement and action. We thank you in advance for all the consideration and pray for your good judgement to prevail.

(R., p.80.) His parents also appeared at the Rule 35 hearing and made another statement supporting their son. (Tr., p.52, L.15 – p.54, L.16.) Additionally, he supplied a letter from his former employer, Steven Vu:

This Memo is regards Kordell Mallick, Kordell was previously my employee at Rimrock GMC, I was the General Manager for the dealership. Kordell is a wonderful person with a big heart whom cares for others and works very well with his employees. I am at awe to have heard what have happened to him, and extremely sadden by the news . . . I believe within my heart that he was influence by the wrong crowd, and wish that whoever is in charge of his case sees this and please give him another opportunity in his future.

(R., p.81.) And, he supplied a letter of support from his uncle, Adam Mallak. (R., p.82.)

Furthermore, in *State v. Alberts*, 121 Idaho 204 (Ct. App. 1991), the Idaho Court of Appeals reduced the sentence imposed, “In light of Alberts’ expression of remorse for his conduct, his recognition of his problem, his willingness to accept treatment and other positive attributes of his character.” *Id.* 121 Idaho at 209. At the hearing, Mr. Mallak noted that he has not had any issues while in custody; that he has not yet had an opportunity to participate in treatment while in custody; this is his first felony as an adult, although he had some issues as a juvenile; he is working as a janitor in the chapel; and he has a sincere desire to stop using drugs and turn his life around. (Tr., p.35, L.15 – p.41, L.11.) He also supplied the court with a copy of a letter offering him a full-time job as a Construction Laborer with Timberline Creations in Billings, Montana. (R., p.68.)

Based upon the additional information presented with his Rule 35 motion and the mitigating factors present in his case, Mr. Mallak asserts that the district court abused its discretion in denying his Rule 35 motion. He asserts that had the district court given proper

weight and consideration to the mitigating factors in his case: his willingness to complete substance abuse treatment, friend and family support, and employment opportunities upon release, it would have granted the Rule 35 motion and reduced the fixed portion of his sentence to three years.

CONCLUSION

Mr. Mallak respectfully requests that this Court reduce his sentence as it deems appropriate. Alternatively, he requests that the order denying his Rule 35 motion be vacated and the case remanded to the district court for further proceedings.

DATED this 28th day of October, 2020.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of October, 2020, I caused a true and correct copy of the foregoing APPELLANT’S BRIEF to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

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

EAA/eas