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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 48051-2020
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR01-18-19026
v.)	
)	
ROCKY JOE CLIFFORD,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Within months of successfully completing a rider and being placed on probation, Rocky Clifford received three devastating blows: his father committed suicide in his presence, his sixteen-year-old dog died, and his brother was incarcerated. Consumed by anger and grief, Mr. Clifford relapsed. He then committed a felony DUI, to which he pleaded guilty. The district court sentenced him to ten years, with five years determinate. Mr. Clifford filed an Idaho Criminal Rule 35 motion, which the district court denied. Mr. Clifford now appeals. On appeal, he argues the district court abused its discretion by denying his Rule 35 motion.

Statement of the Facts & Course of Proceedings

Mr. Clifford successfully completed a rider in case number CR01-16-28434 (“2016 case”), for felony driving under the influence (“DUI”), and was placed on probation. (Conf. Ex., p.48.) He left the program sober, and committed to changing his life. (Conf. Ex., pp.3-4.) However, less than 100 days later, he found himself facing three hard facts: (1) he would never have a relationship with his father because his father was dead; (2) he would never see his best friend again because his dog of sixteen years was dead; and (3) he may never see his only brother again because his brother was imprisoned and fighting cancer. (Conf. Ex., p.4; R., pp.67, 71.) Though it seemed to outsiders that Mr. Clifford was “coping okay” (Conf. Ex., p.48), it was quite clear that the tragedy of witnessing his father’s suicide, the death of his dog, and his only sibling’s incarceration were too much in a short period, and he slipped – he began to drink. (Conf. Ex., p.4.) He then got into a car and drove. (R., p.10.) He was charged with, among other things, felony DUI in case number CR01-18-19026 (“2018 case”). (R., p.9.) These new charges triggered a probation violation in the 2016 case. (R., p.39.) Mr. Clifford admitted to the probation violations in the 2016 case. (Sent. Tr., p.3, Ls.15-22¹; R., p.74.) As a result of a plea agreement in the 2018 case, Mr. Clifford pleaded guilty to felony DUI, eluding the police, and resisting or obstructing officers. (Plea Tr., p.4, L.23 – p.5, L.1, p.11, L.14 – p.13, L.17.) The district court then consolidated the cases. (R., p.47.)

At sentencing, the district court revoked probation in the 2016 case and commuted the sentence to time served. (Sent. Tr., p.20, Ls.1-6.) The district court then sentenced Mr. Clifford

¹ There are two transcripts on appeal contained in one electronic document: The Entry of Guilty Plea on May 31, 2018 and the Hearing on July 31, 2018. Citations to the May 31, 2018 hearing will refer to “Plea Tr.” and citations to the July 31, 2018 hearing will refer to the “Sent. Tr.” Citations to each transcript will refer to the transcript’s internal pagination in the top right corner, rather than the page number in the bottom center of each page.

to ten years, with five years determinate, for felony DUI in the 2018 case. (Sent. Tr., p.20, Ls.10-13.) It also sentenced him to five years indeterminate for eluding police, and six months for resisting and/or obstructing an officer, with both running concurrently with the DUI sentence. (Sent. Tr., p.21, Ls.8-14.)

Mr. Clifford did not initially file a timely Rule 35 motion. (*See generally* R.) However, through a separate post-conviction case, a stipulation was reached, by which Mr. Clifford was permitted to file a Rule 35 motion in this case. (R., p.59.) Mr. Clifford timely filed a Rule 35 motion requesting his 2018 DUI sentence be reduced to two and one-half years determinate with seven and one-half years indeterminate. (R., pp.65-68.) In support of his Rule 35 motion, he submitted letters from his mother and himself. (R., pp.70-71.) The district court denied the motion on the merits. (R., pp.72-77.) Mr. Clifford timely filed a notice of appeal from the order denying his Rule 35 motion. (R., p.79.)

ISSUES

Whether the district court abused its discretion when it denied Mr. Clifford's Rule 35 motion.

ARGUMENT

The District Court Abused Its Discretion When It Denied Mr. Clifford's Rule 35 Motion For A Reduction Of Sentence In Light Of the Additional Information Regarding Mr. Clifford's Childhood, The Recent Events Leading Up To His Arrest, And His Treatment And Plans For Sobriety

Mr. Clifford argues the district court did not exercise reason, and therefore abused its discretion, by denying his Rule 35 motion. The additional information Mr. Clifford submitted to the district court in support of that motion demonstrates his sentence of ten years, with five years determinate, is excessively harsh. Specifically, the additional information regarding his

childhood, the circumstances that led up to this offense, and his treatment plan demonstrate that his sentence is objectively unreasonable and should have been reduced.

If a sentence is within the statutory limits, then the request for a sentence reduction pursuant to Rule 35 is a plea for leniency and is reviewed for an abuse of discretion. *State v. Huffman*, 144 Idaho 201, 203 (2006). In determining if an abuse of discretion occurred, appellate review centers on 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.” *State v. Bodenbach*, 165 Idaho 577, 591 (2019). “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.” *Huffman*, 144 Idaho at 203.

Prior to the 2018 DUI, Mr. Clifford successfully completed his rider, during which no sanctions or interventions were necessary. (Conf. Ex., p.47.) His probation officer had no issues or concerns with Mr. Clifford. (Conf. Ex., p.48.) His LSI score had, in fact, gone down. (*Compare* Conf. Ex., p.37, with PSI, p.22.) And Mr. Clifford was employed. (Conf. Ex., p.48.) Then, Mr. Clifford “suffered a series of tragic losses” (Conf. Ex., p.4), the severity of which were not fully explained at his sentencing hearing. (R., p.66.)

When Mr. Clifford pleaded guilty in the 2018 case, he tried to explain the circumstances leading up to the charges: “I had been in recovery; I did a program. I was doing good. I had a patch of lots of bad things happen in my life and I relapsed and it didn’t take long at all before I was making very poor decisions again.” (Plea Tr., p.15, Ls.16-20.) This explanation did not adequately portray to the district court the “patch of bad things” Mr. Clifford had recently

suffered. At the sentencing hearing, Mr. Clifford's counsel and the prosecutor touched on the circumstances in Mr. Clifford's life prior to his being charged with the 2018 DUI; however, those circumstances were largely downplayed. The prosecutor stated "I understand that Mr. Clifford went through some rough times and that's what led him to drink." (Sent. Tr., p.10, Ls.19-21.) This did not fully explain the "bad things that happened." In downplaying the tragic losses, the prosecutor explained that Mr. Clifford had been given many opportunities to learn to cope with rough patches in his life without drinking (Sent. Tr., p.11, Ls.1-5), and asserted that Mr. Clifford should have been prepared to deal with the traumatic weeks leading up to his offense.

It's not too much for us to expect that when close family members pass away, when we lose our pets, when those kinds of things happen to us, you know, especially when they happen to someone like Mr. Clifford who has two felony DUIs and has been through several treatment programs that have taught him how to cope with those skills without drinking, it's not too much to expect that you are going to figure out a different way to deal with that.

(Sent. Tr., p.11, Ls.8-1.) The prosecutor stated, "While I'm sympathetic to his plight . . . the next time Mr. Clifford loses someone close to him, he's going to — he's going to go out and do this again." (Sent. Tr., p.11, L.19 – p.12, L.1.) In response, Mr. Clifford's counsel stated that Mr. Clifford did fall on "hard times," but he did not explain the extent to which the "hard times" affected Mr. Clifford, nor the precise "hard times" that occurred. Rather Mr. Clifford's counsel merely stated that Mr. Clifford "wasn't equipped to deal with" the loss of his father, his brother, and his dog. (Sent. Tr., p.14, Ls.12-18.)

Mr. Clifford then addressed the district court, and rather than elaborate on the difficult circumstances surrounding his past offense, he spoke of the future, stating that he understood that he cannot "touch alcohol ever again." (Sent. Tr., p.14, Ls.2-3.) Mr. Clifford tried to explain his plan for after he paid his dues: "When I get out, I am going to start off in an inpatient and keep

myself on a shorter leash.” (Sent. Tr., p.16, Ls.14-15.) He explained that “when I lived in a halfway house and was under more scrutiny and being watched, I behaved really well and made improvements in my life.” (Sent. Tr., p.16, Ls.16-18.) He understood that he needs to take responsibility and he is “going to set better boundaries when I allow myself freedoms and keep myself out of trouble.” (Sent. Tr., p.16, Ls.19-21.)

The district court, in sentencing Mr. Clifford, stated “My notes from the — my impressions from the first sentence, the presentence that read when I sentenced the 2016 case back in June 2017 the first time, was that this is a case that probably deserved prison.” (Sent. Tr., p.18, Ls.21-25) The district court then revoked Mr. Clifford’s probation, but commuted his sentence as time served, in the 2016 case, and sentenced Mr. Clifford to ten years, with five years determinate in the 2018 case. (Sent. Tr., p.20, Ls.1-6, 11-13.) Mr. Clifford accepted his ten-year sentence, but requested a reduction in the determinate portion of his sentence. (R., p.68.)

In support of his Rule 35 motion, Mr. Clifford submitted a letter he wrote, as well as a letter from his mother. (R., pp.70-71.) In his letter, Mr. Clifford explained that in the two years he was incarcerated in Texas, he had “come up with a success plan” for his substance abuse and was determined to repair the relationships with his family “who tried to help [him] with [his] addiction even though [he] was unwilling.” (R., p.70.) Debra Clifford, Mr. Clifford’s mother, further elaborated on this success plan in her letter submitted in support of Mr. Clifford’s Rule 35 motion. (R., p.71.) She explained that Mr. Clifford would receive the services of her brother’s substance abuse facility and have the support of the new family and friends with whom she has surrounded herself. (R., p.71.) This new support system would help Mr. Clifford achieve the stability and sobriety he seeks. (R., p.71.) In addition, she explicated why Mr. Clifford turned to drinking: his father. (R., p.71.)

In her letter, Ms. Clifford stated that Mr. Clifford's father was mentally and physically abusive to Mr. Clifford. (R., p.71.) In fact, he denied that Mr. Clifford was even his child. (R., p.71.) This scarred Mr. Clifford, who only wanted to be loved by, and have a relationship with, his father. (R., p.71.) Then, weeks before the 2018 DUI, Mr. Clifford's father committed suicide—in the family house and in Mr. Clifford's presence—thus depriving Mr. Clifford of the father-son relationship he had sought his whole life. (R., pp.67, 71.) In addition, Mr. Clifford's brother was incarcerated and is battling cancer. (R., pp.67, 71.) The intensity of the loss that Mr. Clifford suffered prior to his 2018 DUI was not adequately portrayed at the sentencing hearing. (R., p.68.) While it may be true that Mr. Clifford has had multiple attempts at treatment, and has had opportunities to be successful on probation, nothing could have prepared him for the events that occurred weeks before his 2018 DUI. Mr. Clifford did not merely suffer the loss of a family member. (Sent. Tr., p.11, L.9.) He witnessed the suicide of his father. (R., p.67.) He did not merely lose his pet (Sent. Tr., p.11, Ls.9-10), but had to put down his best friend of sixteen years. (Sent. Tr., p.14, L.16; PSI, p.21.) Mr. Clifford's brother was not simply incarcerated (Sent. Tr., p.14, L.15), he was imprisoned and diagnosed with stage-three cancer. (R., pp.67, 71.)

In light of this additional information, Mr. Clifford submits the district court abused its discretion in denying his Rule 35 motion requesting the district court reduce his determinate portion of his sentence. The district court should have reduced the determinate portion of his sentence to two and one-half years.

CONCLUSION

Mr. Clifford respectfully requests that this Court reduce his sentence to ten years, with two and one-half years determinate. Alternatively, he requests that the order denying his Rule 35 motion be vacated and the case be remanded to the district court for further proceedings.

DATED this 27th day of January, 2021.

/s/ Emily M. Joyce
EMILY M. JOYCE
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of January, 2021, 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

EMJ/eas