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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 48051-2020
Plaintiff-Respondent,)	
)	Ada County Case No.
v.)	CR01-18-19026
)	
ROCKY JOE CLIFFORD,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
)	

Has Clifford failed to show that the district court abused its discretion when it denied his Rule 35 motion for reduction of sentence?

ARGUMENT

Clifford Has Failed To Show That The District Court Abused Its Discretion When It Denied His I.C.R. 35(b) Motion For Reduction Of Sentence

A. Introduction

In April 2018 in Ada County, an officer observed Clifford's vehicle driving 55 miles per hour in a posted 35 miles per hour zone. (PSI, pp.1-2.¹) The officer attempted to effectuate a

¹ Citations to page numbers of the "PSI" refer to the electronic file containing the "abbreviated File Review PSI" associated with this case, the full PSI associated with Clifford's prior felony DUI, and other documents.

traffic stop. (PSI, p.2.) Clifford did not stop, but instead ran a stop sign and a red light, and increased his speed to 90 miles per hour. (Id.) He also drove into an oncoming turn lane due to his speed. (Id.) The police pursuit was discontinued for safety reasons. (PSI, pp.2, 71.) Shortly thereafter, officers spotted Clifford's vehicle near his known address. (PSI, p.2.) Clifford pulled over, but then made a U-turn causing his vehicle to face the pursuing police vehicle. (PSI, p.68.) Clifford then put his vehicle into reverse and collided with another police vehicle that was positioned behind him. (PSI, pp.2, 68.)

Clifford ran from his vehicle and towards his residence. (PSI, p.2.) Officers stopped him in the doorway, but Clifford continued to resist by keeping his hands balled in fists and not allowing handcuffs to be placed on him. (PSI, pp.2, 65.) Clifford continued resisting even after he was tased, but was eventually placed into handcuffs. (PSI, pp.2, 68-69.) Clifford exhibited a slow, slurred, "thick tongue manner of speech," had a strong odor of alcoholic beverage emanating from him as he spoke, and had an open container of alcohol in his car. (PSI, p.2.) Due to his continuing physical resistance, no standard field sobriety tests were conducted, and Clifford was placed in a WRAP restraint. (Id.) A subsequent blood test revealed a BAC of .229. (PSI, p.75.)

At the time of the incident, Clifford was on probation for two different prior felony DUIs, and had two misdemeanor DUI convictions prior to that. (PSI, pp.2-3, 11-12.) In this case, the state charged Clifford with felony DUI, felony eluding, aggravated battery on law enforcement personnel, resisting or obstructing officers, open container, and driving without privileges. (R., pp.30-32.) Pursuant to a plea agreement with the state, Clifford pled guilty to felony DUI, felony eluding, and obstructing or delaying officers, and the state agreed to dismiss the other charges

and agreed to not pursue a persistent violator sentencing enhancement. (R., pp.35-44; 5/31/18 Tr., p.3, L.12 – p.17, L.19.)

The district court followed the state’s sentencing recommendation (7/31/18 Tr., p.6, Ls.19-25), and imposed a unified 10-year sentence with five years fixed for felony DUI, with lesser concurrent sentences on the other charges (R., pp.53-58). The court also revoked Clifford’s probation from his previous Ada County felony DUI, but declined to follow the state’s recommendation (7/31/18 Tr., p.6, Ls.19-25), to impose this sentence. Instead, the court commuted the originally imposed 10-year unified sentence (see PSI, p.3), to the 594 days that Clifford already served (7/31/18 Tr., p.20, Ls.1-9).²

Clifford did not initially file a timely I.C.R. 35(b) motion, but following a stipulation made by the parties in a post-conviction proceeding, Clifford was permitted to do so. (R., pp.59-61.) Clifford requested that the district reduce the fixed portion of his felony DUI sentence by half, from five years to two-and-a-half-years. (R., pp.62-69.) In support, Clifford submitted two letters, one from himself, and one from his mother. (R., pp.70-71.) Clifford’s primary argument appeared to be that his most recent felony DUI came in the aftermath of a series of personal tragedies, including the suicide of his father, and the incarceration of his brother. (R., pp.67-68.) The district court denied the I.C.R. 35(b) motion without a hearing. (R., pp.72-78.) Clifford timely appealed. (R., pp.79-81.)

² Clifford was also on felony probation for a prior felony DUI from Canyon County. (See PSI, p.12.) The state filed a petition for probation violation in that case based, in part, upon Clifford’s 2016 Ada County felony DUI. (PSI, pp.80-84.) However, the warrant for that probation violation was not served by the time of Clifford’s 2018 Ada County felony DUI. (PSI, p.3) This probation was subsequently revoked in 2020. See Idaho Data Repository, Sate v. Clifford, Canyon County District Court Case No CR-2013-24718.

B. Standard Of Review

“A motion for reduction of sentence under Rule 35 is essentially a plea for leniency addressed to the sound discretion of the court.” State v. Golden, 167 Idaho 509, ___, 473 P.3d 377, 382 (Ct. App. 2020). In evaluating whether a lower court abused its discretion, the appellate court conducts a four-part inquiry, which asks “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. Herrera, 164 Idaho 261, 272, 429 P.3d 149, 160 (2018) (citing Lunneborg v. My Fun Life, 163 Idaho 856, 863, 421 P.3d 187, 194 (2018)).

C. Clifford Has Failed To Show That The District Court Abused Its Discretion

“In 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 motion.” State v. Yang, 167 Idaho 944, ___, 477 P.3d 998, 1003 (Ct. App. 2020) (citing State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007)).

In denying his I.C.R. 35(b) motion in this case, the district court cited and applied the correct law and standards consistent with the above. (R., pp.72-73.) The court then summarized the procedural history of the case, and of Clifford’s prior felony DUI, and stated that it had re-reviewed the record. (R., pp.74-75.) The court recognized the “particularly aggravated” nature of the new felony DUI, properly found that Clifford posed “an extreme danger to the public,” and concluded that Clifford had failed to establish a basis for leniency. (R., pp.76-77.) A review of the record supports the district court’s determination to deny Clifford’s I.C.R. 35(b) motion.

On appeal, Clifford highlights three aspects of the argument contained in his I.R.C. 35(b) motion: (1) the personal tragedies he faced shortly before the commission of the underlying offense – his father committing suicide in his presence, his 16-year-old dog dying, and the incarceration of his brother, who was fighting cancer – factors which Clifford asserts were “downplayed” by his counsel and the prosecutor during the sentencing hearing; (2) information that his father was mentally and physically abusive to him; and (3) that he has come up with a “success plan” for his substance abuse. (See generally Appellant’s brief.)

Clifford’s argument regarding the personal tragedies he faced prior to his commission of the underlying offense was not new, but was presented at the sentencing hearing and was included in the PSI report. (7/31/18 Tr., p.14, Ls.4-18; PSI, pp.4, 48.) Clifford’s assertion that these tragedies were “downplayed” during the sentencing hearing does not render them “new or additional” information as required to support an I.C.R. 35(b) motion.³ In any event, these personal tragedies do not warrant a reduced sentence. The fact that Clifford’s method of coping with highly stressful situations is to drive drunk and endanger the community is, if anything, an aggravating factor that justified a significant fixed sentence. Clifford similarly attributed his August 2016 relapse, which occurred just prior to his September 2016 prior Ada County felony DUI (PSI, p.3), to his depression following a breakup with his girlfriend (PSI, pp.20, 23).

Clifford’s father’s mental and physical abuse was likewise previously before the sentencing court pursuant to a letter submitted by Clifford’s mother that was included in the PSI report. (PSI, p.4.) Clifford’s mother’s letter submitted in support of Clifford’s I.C.R. 35(b) motion did not present substantially more information about this abuse, let alone demonstrate it

³ To the extent Clifford argues that his trial counsel was ineffective at the sentencing hearing, such a claim may not be presented in an I.C.R. 35 motion. State v. Warrant, 135 Idaho 836, 842, 25 P.3d 859, 865 (Ct. App. 2001); State v. Johnson, 117 Idaho 650, 652, 791 P.2d 31, 33 (Ct. App. 1990).

warranted a reduced fixed sentence. (See R., p.71.) While Clifford did present, in his own letter submitted in support of his I.C.R. 35(b) motion (R., p.70), new information that he had developed a “success plan” during his most recent incarceration, he offered no details with respect to this plan. Further, Clifford made similar representations to the presentence investigator following his prior felony DUI. (PSI, p.21.) At that time, Clifford stated that “I’m serious this time,” “I am facing reality now,” “[t]his time has sobered me,” and “I have plans to stay sober and treatment set up.” (Id.)

Whether new or not, none of the information presented by Clifford, individually or collectively, warranted a lesser sentence in light of the severe danger Clifford poses to the community, as properly recognized by the district court. As noted above, this was Clifford’s *fifth* DUI conviction, having been previously convicted of misdemeanor DUI in 2009 and 2013, and of felony DUI in 2014 and 2016. (PSI, pp.2-3, 11-12.) Clifford’s most recent felony DUI occurred only about 100 days after he was placed on probation following the period of retained jurisdiction associated with his prior felony DUI. (PSI, p.3.) Clifford also has more than 20 prior misdemeanor convictions for offenses including petit theft, possession of a controlled substance, carrying a concealed weapon without a license, and providing false info to an officer. (PSI, pp.9-10.)

Further, Clifford’s dangerous conduct has continued to escalate. After committing his first felony DUI, Clifford pulled over without incident and provided a breath sample upon his arrest. (PSI, pp.27-29.) However, in the course of both of his next two felony DUI offenses, Clifford fled from police attempting to effectuate traffic stops. (PSI, pp.1-2, 7-8.) By his third felony DUI, as noted above, Clifford’s conduct escalated to fleeing on foot after ramming a police vehicle, and then resisting arrest when officers caught up with him. (PSI, pp.2, 65, 68-

69.) As the prosecutor argued at the sentencing hearing, “[e]ven among habitual drunk drivers, Mr. Clifford is among the worst that I have ever seen as far as the way he behaves when he gets drunk and drives.” (7/31/18 Tr., p.10, Ls.15-18.)

Finally, as he acknowledges on appeal (Appellant’s brief, p.7), Clifford has had multiple opportunities for treatment and community supervision. Clifford has participated in both a CAPP rider program and a traditional rider. (PSI, pp.2-3.) Clifford was granted community supervision three times in four years, and was unsuccessful each time. (PSI, pp.4-5.) At the sentencing hearing, the district court agreed with defense counsel’s assertion that *if* Clifford could obtain long-term sobriety, he would not be a danger to the community - but also recognized that Clifford has been unable to accomplish this despite many opportunities. (7/31/18 Tr., p.18, L.10 – p.19, L.11.) Also at the sentencing hearing, Clifford explained that when he lived in a halfway house and “was under more scrutiny and [was] being watched,” he “behaved really well.” (7/31/18 Tr., p.16, Ls.16-21.) Clifford’s implicit acknowledgment, as supported by his criminal history, that he is likely to commit crimes when permitted more freedom, such as on probation and parole, further supports the district court’s sentencing determination and denial of his I.C.R. 35(b) motion. In light of the severe and escalating danger Clifford poses to the community, the district court’s five-year fixed sentence was reasonable even following the submission of the information contained in the two letters submitted in support of the I.C.R. 35(b) motion.

Clifford has failed to show that the district court abused its discretion by declining to reduce his fixed sentence by half, and by denying his I.C.R. 35(b) motion for reduction of sentence. This Court should therefore affirm the district court’s determination.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order denying Clifford's I.C.R. 35(b) motion.

DATED this 20th day of April, 2021.

/s/ Mark W. Olson
MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 20th day of April, 2021, 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/ Mark W. Olson
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MWO/dd