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State v. Burns Respondent's Brief Dckt. 48242

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. JAYSON BARY BURNS, Defendant-Appellant.	)	NO. 48242-2020 Bonneville County Case No. CR10-20-5149 RESPONDENT'S BRIEF

ISSUES

1. Has Burns failed to establish that the district court abused its discretion by imposing concurrent unified sentences of seven years, with two and one-half years fixed, for possession of heroin and possession of methamphetamine and five years, with two and one-half years fixed, for felony eluding?

2. Has Burns failed to establish that the district court abused its discretion by denying his Rule 35 motion for reduction of sentence?

STATEMENT OF THE CASE

On May 31, 2020, at approximately 10:21 P.M., officers responded to a Holiday Inn Express based on a report that Burns, a "known wanted fugitive[]," was staying at the hotel. (R., pp. 12-13.) Officers observed Burns driving out of the hotel parking lot "without any headlights on," and noted that he had been "preparing to turn north … but then saw [the officers] and turned south." (R., p. 13.) As officers pursued, Burns cut across several lanes of travel without using a turn signal, "turned left on [a] red light," and "began to swerve and increase in speed." (Id.) After Burns ran a red light while travelling approximately 80 miles per hour in a 40 miles-per-hour zone, requiring multiple vehicles to stop, the officers "determined it was too unsafe to continue" and discontinued the pursuit. (Id.)

At approximately 4:26 A.M. the following morning, Burns returned to the Holiday Inn Express and, when he saw officers in the hotel lobby, he "threw items he had in his hands on the ground and turned around and began to run." (R., p. 14.) The officers chased Burns and ordered him to stop; however, Burns continued to flee until he "tripped and fell," after which he physically resisted arrest and officers ultimately had to taze him twice to "take him safely into custody." (R., pp. 14-15.) Upon searching Burns's person, officers located a container of heroin, a plastic bag containing methamphetamine, two syringes – one of which was "loaded" with methamphetamine, a glass methamphetamine pipe, and "brass knuckles." (R., pp. 15-16.)

The state charged Burns with possession of heroin, possession of methamphetamine, felony eluding, possession of drug paraphernalia, and resisting or obstructing officers. (R., pp. 33-35.) Pursuant to a plea agreement, Burns pled guilty to possession of heroin, possession of methamphetamine, and felony eluding. (R., pp. 60-65.) In exchange, the state dismissed the remaining charges, as well as two separate cases in their entirety. (R., pp. 60-65.) The district

court imposed concurrent unified sentences of seven years, with two and one-half years fixed, for possession of heroin and possession of methamphetamine and five years, with two and one-half years fixed, for felony eluding. (R., pp. 71-75.) Burns filed a notice of appeal timely from the judgment of conviction. (R., pp. 86-89.) He also filed a timely Rule 35 motion for reduction of sentence, which the district court denied. (R., pp. 79-80, 84-85.)

Burns asserts that his sentences are excessive and that the district court abused its discretion by denying his Rule 35 motion for reduction of sentence. (Appellant's brief, p. 2.)

ARGUMENT

I.
Burns Has Failed To Show That The District Court Abused Its Sentencing Discretion

A. Introduction

The district court imposed concurrent unified sentences of seven years, with two and one-half years fixed, for possession of heroin and possession of methamphetamine and five years, with two and one-half years fixed, for felony eluding. (R., pp. 71-75.) On appeal, Burns contends his sentences are excessive in light of his purported remorse, acceptance of responsibility, and request to again participate in the retained jurisdiction program. (Appellant's brief, pp. 3-4.) The record supports the sentences imposed.

B. Standard Of Review

Appellate review of a sentence is based on an abuse of discretion standard. State v. Dobbs, 166 Idaho 202, ___, 457 P.3d 854, 855 (2020) (citation omitted). "Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable and, thus, a clear abuse of discretion." State v. Schiermeier, 165 Idaho 447, 454, 447 P.3d 895, 902 (2019) (citation omitted). "A sentence fixed within the limits prescribed by the statute will ordinarily not be

considered an abuse of discretion by the trial court." Id. "A sentence of confinement is reasonable if it appears at the time of sentencing that confinement is necessary 'to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution applicable to the given case.'" Id. (quoting State v. Toohill, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982)). The district court has the discretion to weigh those objectives and to give them the weight deemed appropriate. Dobbs, 166 Idaho at ___, 457 P.3d at 856. "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ." State v. Bodenbach, 165 Idaho 577, 591, 448 P.3d 1005, 1019 (2019) (citation omitted).

C. The District Court Did Not Abuse Its Discretion

Application of these legal standards to the facts of this case shows no abuse of discretion. First, the district court applied the correct legal standards. (8/3/2020 Tr., p. 11, Ls. 17-24.) It found that the protection of society "[c]ertainly … comes into play, not just the drug use but also the eluding. A lot of people are put at risk." (8/3/2020 Tr., p. 11, Ls. 18-20.) The court further stated, "I look at deterrence, punishment, rehabilitation. I think all of those factors apply." (8/3/2020 Tr., p. 11, Ls. 22-24.) It noted, "[W]e started out with three felony cases; and you whittled that down to just three felony charges. So it's been a difficult year as far as criminal behavior on your part" (8/3/2020 Tr., p. 15 Ls. 1-4), and "there's a measure of punishment that goes along with all of this" (8/3/2020 Tr., p. 16, Ls. 1-2). The court "considered … a rider" (8/3/2020 Tr. p. 12, L. 16) but was "just not convinced we're going to get much out of a rider program" (8/3/2020 Tr., p. 14, L. 25 – p. 15, L. 1). It stated, "The fact is, you did well on a [prior] rider and then got probation as a result; but whatever you learned on [the] rider really didn't take because you weren't really doing well on probation" (8/3/2020 Tr., p. 12, Ls. 17-20),

and, "I'm not going to opt for a rider. We did that. We tried that. That wasn't very helpful" (8/3/2020 Tr., p. 12, Ls. 23-25). The court noted that it was "certainly considering rehabilitation" (8/3/2020 Tr., p. 11, L. 24), and that Burns "can still take classes and take counseling and be prepared to be successful on parole" (8/3/2020 Tr., p. 15, Ls. 17-19).

The district court's decision is supported by the record. Burns presents a danger to the community in light of his ongoing criminal offending. As a juvenile, Burns was adjudicated for crimes including battery, petit theft, two separate burglaries, and two counts of possession of alcohol by a minor, as well as numerous probation violations. (PSI, pp. 4-6.[1]) Burns's adult criminal record contains at least four prior felony convictions and 17 misdemeanor convictions (at least two of which were amended from felonies), including convictions for crimes that endanger and/or harm others such as injury to a child, aggravated assault, unlawful possession of a weapon, reckless driving, DUI, two convictions for misdemeanor flee/attempt to elude a police officer, and a previous conviction for felony eluding. (PSI, pp. 1, 7-11.) In addition, he had separate charges for felony eluding and misdemeanor flee/attempt to elude a police officer that were still pending at the time that the presentence report was completed. (PSI, p. 11.)

Burns also has an abysmal history on community supervision. He has previously had numerous opportunities on probation and parole, but he repeatedly violated the terms of supervision in the community with conduct including committing new crimes, using drugs and alcohol, selling methamphetamine and heroin, avoiding and absconding from supervision, and – on at least three separate occasions – fleeing from police while driving at high speeds. (PSI, pp.

[1] PSI page numbers correspond with the page numbers of the electronic file "Confidential Exhibit Record.pdf."

8-11, 14-15.) A former probation officer reported that Burns was "'not cut out for probation … he was highly dishonest, lacked any remorse, was uncooperative, and refused to engage in supervision in any way. He absconded and his probation had to be revoked without any level of success at any time.'" (PSI, p. 12.)

Burns has previously been afforded multiple treatment opportunities, but has nevertheless persisted in his criminal thinking and behavior, with no regard for the safety and well-being of others. He was offered Drug Court following one of his probation violations; however, he "refused to go into Drug Court" and instead chose to top out his time while incarcerated. (PSI, p. 12.) He completed the Therapeutic Community retained jurisdiction program, the Correctional Alternative Placement Program, and treatment and programming while in prison, none of which precluded his drug abuse and criminal offending. (PSI, pp. 14-15.) The presentence investigator advised, "Given Mr. Burns' extended history, I remain concerned about his relapse potential, risk to himself, and risk to others. As such, I respectfully recommend another period of incarceration for the defendant, involving a secure placement and access to additional treatment services." (PSI, p. 24.) All of this information supports the district court's determination that a prison sentence was necessary to meet the goals of sentencing.

On appeal, Burns argues that his sentences are excessive in light of his purported remorse, acceptance of responsibility, and desire to participate in treatment. (Appellant's brief, p. 4.) Contrary to Burns's claim that he wishes to participate in treatment, he failed to attend his initial appointment and at Tueller Counseling Services while this case was pending and did not follow through with substance abuse treatment while in the community. (PSI, pp. 20, 23-24.) Burns's purported remorse and acceptance of responsibility mean little given his numerous, ongoing attempts to avoid that responsibility by fleeing from law enforcement. In fact, Burns's

efforts to dodge accountability for his criminal actions have only escalated – while he previously incurred convictions for fleeing or attempting to elude officers three separate times between 2008 and 2017, his recent charges include three additional attempts to elude police within a period of less than 17 months (between 2019 and 2020). (PSI, pp. 7, 9-11.) Burn's repeated decisions to put others at risk by fleeing from police demonstrate the danger he poses to society. Burns's arguments do not show that the district court abused its sentencing discretion.

Burns's sentences are appropriate in light of his ongoing criminal behavior and efforts to avoid accountability, his failure to rehabilitate or be deterred, and the danger he presents to the community. Burns has not demonstrated that the district court abused its discretion when it determined that an aggregate unified sentence of seven years, with two and one-half years fixed, was necessary to meet the goals of sentencing.

II.
Burns Has Failed To Show That The District Court Abused Its Discretion When It Denied His Rule 35 Motion For Reduction Of Sentence

A. Introduction

Burns next asserts that the district court abused its discretion when it denied his Rule 35 motion for reduction of sentence because he wished to be placed at a work camp "as soon as possible." (Appellant's brief, p. 5.) Burns has failed to establish any basis for reversal of the district court's order denying his Rule 35 motion.

B. Standard Of Review

"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." State v. Burggraf, 160 Idaho 177, 180, 369 P.3d 955, 958 (Ct. App. 2016). "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, 159 P.3d 838, 840 (2007).

C. Burns Failed To Show His Sentences Were Excessive In Light Of New Information

Burns provided no new information in support of his Rule 35 motion for reduction of sentence. (R., p. 79.) At the hearing on his Rule 35 motion, Burns merely stated that wanted to "get to a work camp or something like that as soon as possible." (8/17/2020 Tr., p. 4, Ls. 21-25.) Burns's desire to be placed at a work camp is not "new" information that supports a reduction of sentence, as the placement of inmates lies within the discretion of the Idaho Department of Correction. Because Burns presented no new evidence in support of his Rule 35 motion, he failed to demonstrate in the motion that his sentences were excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court's order denying his Rule 35 motion.

CONCLUSION

The state respectfully requests this Court to affirm Burns's convictions and sentences and the district court's order denying Burns's Rule 35 motion for reduction of sentence.

DATED this 28th day of June, 2021.

/s/ Kenneth K. Jorgensen
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Deputy Attorney General

VICTORIA RUTLEDGE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of June, 2021, served a true and correct copy of the attached RESPONDENT'S BRIEF to the attorney listed below by means of iCourt File and Serve:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER
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_/s/ Kenneth K. Jorgensen_____
KENNETH K. JORGENSEN
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