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ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

JACOB L. WESTERFIELD
Deputy State Appellate Public Defender
I.S.B. #9841
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NOS. 48391-2020 & 48392-2020
)	
v.)	KOOTENAI COUNTY NOS.
)	CR28-19-15305 & CR28-19-16216
)	
JEPHY ALLEN BORDEN,)	
)	APPELLANT'S BRIEF
Defendant-Appellant.)	
)	

STATEMENT OF THE CASE

Nature of the Case

After Jephy Borden pled guilty to felony eluding and burglary in the first case and burglary in the second case, the district court sentenced him to serve concurrent aggregate sentences of ten years, with five years fixed. Mr. Borden appeals, and he argues that the district court abused its discretion by denying his motions to reduce his sentences.

Statement of the Facts & Course of Proceedings

In September 2019, the State filed a criminal complaint in the first case¹ charging Mr. Borden with the one count of felony eluding, two counts of burglary, one count of grand theft, and two counts of petit theft. (No. 48391 R., pp.9-11.) According to the declaration in support of probable cause, an officer activated his overhead emergency lights and attempted to stop a black truck that was observed committing various traffic violations. (No. 48391 R., p.15.) The officer engaged in a high speed pursuit of the black truck, including traveling at approximately sixty-two miles per hour, and later seventy-two miles per hour, in a thirty-five mile per hour zone. (No. 48391 R., p.15.) The police later found the truck, which was unoccupied. (No. 48391 R., p.15.) After further investigation, the police discovered that Mr. Borden was associated with the black truck. (No. 48391 R., pp.19-21.)

While investigating the eluding, the police also responded to a report of a male entering onto private property and forcing his way into a locked barn. (No. 48391 R., pp.24-25.) One of the owners of the barn “discovered an ATV and his dirt bike were taken without his permission.” (No. 48391 R., p.24.) The male was later determined to be Mr. Borden. (No. 48391 R., pp.26-30.) Mr. Borden reportedly sold the ATV and dirt bike afterwards. (No. 48391 R., pp.26-30.)

A few weeks after the first criminal complaint was filed, the State filed a second criminal complaint charging Mr. Borden with three counts of burglary, one count of conspiracy to commit burglary, and one count of grand theft. (No. 48392 R., pp.8-10.) According to the declaration in support of probable cause submitted in that case, Lee and Roxanne Zimmerman (the “Zimmermans”) reported that there had been a break in at two unoccupied residences that they owned. (No. 48392 R., pp.14-16.) The Zimmermans reported that various items had been stolen

¹ Throughout this brief, case number CR28-19-15305 will be referred to as “the first case” and case number CR28-19-16216 will be referred to as “the second case.”

from the homes and that other items had been strewn about in the homes. (No. 48392 R., p.14.) The police observed signs of forced entry into the homes. (No. 48392 R., pp.14-16.) The police later identified Mr. Borden as being associated with these burglaries. (No. 48392 R., pp.15-22.)

Pursuant to a plea agreement, Mr. Borden pled guilty to one count of felony eluding and one count of burglary in the first case and one count of burglary in the second case.² (No. 48391 R., pp.76-81; No. 48392 R., pp.53-58.) At sentencing, the State recommended an aggregate sentence of ten years, with five years fixed, and asked that the sentence be executed for the first case.³ (Tr. Vol. I,⁴ p.9, L.25—p.10, L.4.) For the second case, the State also recommended an executed sentence of ten years, with five years fixed, and asked that the sentence run concurrent to the sentence from the first case. (Tr. Vol. I, p.10, Ls.5-11.) Mr. Borden requested that the district court retain jurisdiction (a “rider”). (Tr., p.15, Ls.8-13, p.23, Ls.13-19.) The district court followed the State’s recommended sentences in each case and sentenced Mr. Borden to serve concurrent aggregate sentences of ten years, with five years fixed, in each case.⁵ (Tr., p.30, Ls.10-20; No. 48391 R., pp.119-21; No. 48392 R., pp.105-07.)

Mr. Borden filed timely motions to reduce his sentences pursuant to Rule 35(b) of the Idaho Criminal Rules in each case. (No. 48391 R., pp.122-25; No. 48392 R., pp.108-10.) The

² The other charges in both cases were dismissed pursuant to the plea agreement. (No. 48391 R., pp.76-81, 85-88; No. 48392 R., pp.53-58, 62-65.)

³ Specifically, the State requested that Mr. Borden serve a sentence of five years, all fixed, for the felony eluding and ten year, with five years fixed, for the burglary concurrent with each other and with the second case. (Tr. Vol. I, p.9, L.24—p.10, L.11.)

⁴ There are two transcripts on appeals, both of which are contained in the electronic document titled “48391 Transcript”. Citations to the first transcript, cited herein as “Tr. Vol. I”, refer to the transcript for the joint sentencing hearing held on March 5, 2020. Citations to the second transcript, cited herein as “Tr. Vol. II” refer to the transcript for the Rule 35 hearing held in both cases on August 28, 2020.

⁵ In the first case, Mr. Borden received an executed sentence of five years, all fixed, for felony eluding and a concurrent sentence of ten years, with five years fixed, for burglary. (No. 48391 R., pp.119-21.) In the second case, Mr. Borden received a concurrent, executed sentence of ten years, with five years fixed, for burglary. (No. 48392 R., pp.105-07.)

district court subsequently denied Mr. Borden's Rule 35 motions. (No. 48391 R., pp.130-31; No. 48392 R., pp.115-16; Tr. Vol. II, p.31, Ls.23-24, p.32, Ls.19-22.) Timely notices of appeal were filed from the orders denying Mr. Borden's Rule 35 motions. (No. 48391 R., pp.132-34; No. 48392 R., pp.117-19.)

ISSUES

Did the district court abuse its discretion when it denied Mr. Borden's motions to reduce his sentences pursuant to Rule 35(b)?

ARGUMENT

The District Court Abused Its Discretion When It Denied Mr. Borden's Rule 35 Motions To Reduce His Sentences

"A Rule 35 motion for reduction of sentence is essentially a plea for leniency, addressed to the sound discretion of the court." *State v. Carter*, 157 Idaho 900, 903 (Ct. App. 2014) (citing *State v. Knighton*, 143 Idaho 318, 319 (2006)). "If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction." *Id.* "In conducting our review of the grant or denial of a Rule 35 motion, we consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence." *Id.*

"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).

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). The Court “conduct[s] an independent review of the record, having regard for the nature of the offense, the character of the offender and the protection of the public interest.” *State v. Burdett*, 134 Idaho 271, 276 (Ct. App. 2000). “Where an appeal is taken from an order refusing to reduce a sentence under Rule 35,” the Court’s scope of review “includes all information submitted at the original sentencing hearing and at the subsequent hearing held on the motion to reduce.” *State v. Araiza*, 109 Idaho 188, 189 (Ct. App. 1985).

In this case, Mr. Borden asserts the district court did not exercise reason, and therefore abused its discretion, by denying his motions to reduce his sentences. A hearing was held on Mr. Borden’s Rule 35 motions, and Mr. Borden testified at the hearing. (*See generally* Tr. Vol. II.) At that hearing, Mr. Borden requested that the district court restructure the sentences in both cases so that he would serve concurrent sentences of ten years, with three years fixed, in each case in order to “do programming and get back to being a member of society and out of prison.” (Tr. Vol. II, p.10, Ls.3-9, p.22, Ls.21-24.)

At the Rule 35 hearing, Mr. Borden explained that he had attempted to enroll in programming through the Idaho Department of Corrections, but that he had been passed over for programming due to the length of his fixed time to serve. (Tr. Vol. II, p.6, Ls.16-23, p.8, Ls.1-12, p.12, L.17—p.13, L.3, p.14, Ls.1-19.) Mr. Borden explained that other inmates with three years or less of fixed time had been given the opportunity to participate in programming. (Tr. Vol. II, p.6, Ls.21-23, p.8, Ls.1-12.) Mr. Borden also asserted that, at the time of the hearing, the spread of COVID-19 had “shut down all our programs” and that there were “zero programs right now.” (Tr. Vol. II, p.15, L.21—p.16, L.9.)

Furthermore, Mr. Borden informed the district court that he was participating in a community trail program in which he was working with the U.S. Forest Service clearing trails in St. Maries, Idaho. (Tr. Vol. II, p.6, L.23—p.7, L.20.) Mr. Borden explained that he had been participating in the U.S. Forest Service program for about two months, and that he had been “working at the college” beforehand. (Tr. Vol. II, p.7, Ls.3-11.) Mr. Borden stated that he would not have been allowed into the U.S. Forest Service program if he was determined to be any sort of security risk. (Tr. Vol. II, p.7, Ls.17-20.) Mr. Borden also asserted at the Rule 35 hearing that he had not had any disciplinary issues since he had been sentenced over five months prior, and that he had “good C-Notes from quite a few officers.” (Tr. Vol. II, p.7, Ls.21-25.) Mr. Borden testified that he had no restrictions on his ability to participate in the U.S. Forest Service program and that he would have not been eligible for the program or to reside at the Givens Halls unit at the Idaho Correctional Institution in Orofino if he had any disciplinary or behavioral issues. (Tr. Vol. II, p.16, L.18—p.17, L.20.) Mr. Borden indicated that he was using the money that he earned from this service program to start paying the restitution that he owed in his cases. (Tr. Vol. II, p.8, Ls.13-16.)

Mr. Borden also explained that he had a plan once he is released into the community, including participating in an eight-month “live-in program” through 180 Ministries.⁶ (Tr. Vol. II, p.10, Ls.11-16.) Mr. Borden informed the district court that he had a job available, support

⁶ While the cases were pending, Mr. Borden filed a motion in each case to be released into an in-patient substance abuse treatment program through 180 Ministries in Denver, Colorado. (No. 48391 R., pp.57-59; No. 48392 R., pp.38-40.) A hearing was held on those motions, but the district court denied Mr. Borden’s request. (No. 48391 R., pp.76-80, 83-84; No. 48392 R., pp.53-57, 60-61.) According to the court minutes, Mr. Borden’s uncle testified at that hearing and informed the district court that he lived in Colorado and would make sure that Mr. Borden would participate in the program. (No. 48391 R., p.78; No. 48392 R., p.55.) Mr. Borden later filed a renewed motion to be released into in-patient substance abuse treatment at 180 Ministries prior to sentencing in both cases, and those motions were subsequently denied by the district court. (No. 48391 R., pp.89-90, 95-107; No. 48392 R., pp.66-67, 72-82, 97-98.)

from his family, and a place to live in Colorado upon his future release into the community. (Tr. Vol. II, p.10, L.17—p.11, L.18, p.14, Ls.20-23.) Mr. Borden further stated that his wife was “basically homeless” and that he wanted to be released so that he could “be there and support her.” (Tr. Vol. II, p.12, Ls.9-16.) Mr. Borden’s testimony was especially pertinent in light of the other mitigating factors that were presented at the time of sentencing.

First, Mr. Borden’s amenability to substance abuse treatment was a strong factor in mitigation. The impact of substance abuse on the defendant’s criminal conduct is “a proper consideration in mitigation of punishment upon sentencing.” *State v. Osborn*, 102 Idaho 405, 414 n.5 (1981). According to Mr. Borden, his father was killed in a traffic collision when he was [REDACTED], and his mother was in a coma for six months afterwards. (PSI, pp.10-11.) Mr. Borden’s mother began to abuse drugs after starting a new relationship following the collision. (PSI, pp.10-11.) Mr. Borden’s mother had Mr. Borden smoke methamphetamine and marijuana with her by the time that he was [REDACTED].⁷ (PSI, pp.10-11.) Mr. Borden and his siblings were placed into foster care by the time that he was [REDACTED] after the man that his mother was in a relationship with choked and beat his sister. (PSI, pp.10-11.) By the time that Mr. Borden was [REDACTED] he “was involved in drug activities, that [he] wound up going to prison for 5 years because of [his] drug addiction and being homeless.” (PSI, pp.10-11.)

Prior to his arrest in these cases, Mr. Borden had “used methamphetamine heavily, smoking up to three grams daily, ingesting the drug hourly every day.” (PSI, p.17.) In the General Appraisal of Individual Needs (“GAIN”) assessment prepared in this case, Mr. Borden

⁷ Mr. Borden also reported that he first drank alcohol at the [REDACTED]. (PSI, p.17.)

reported that he was “under the influence of meth at the time” of the charges.⁸ (PSI, pp.23-24.) Mr. Borden self-reported symptoms to meet the criteria for amphetamine use disorder severe. (PSI, pp.24-25.) The GAIN assessor also determined that Mr. Borden “meets lifetime criteria for substance use disorder severe.”⁹ (PSI, p.25.)

Despite his struggles with drug addiction, Mr. Borden stated that he “has never been to any form of drug treatment.” (PSI, p.17.) Mr. Borden reported in his GAIN assessment that “he has quit using substances and is about 100% ready to remain abstinent.” (PSI, pp.28-29.) The GAIN assessment recommended that Mr. Borden participate in “Level 3.1. Clinically Managed Low-Intensity Residential Services with subsequent Level 2.1 Intensive Outpatient Services.” (PSI, p.32.) The assessor found that Mr. Borden had demonstrated that he was “sufficiently ready to change and cooperative enough to respond to treatment at level 3.1.” (PSI, p.32.) The GAIN assessment strongly recommended in-patient treatment for Mr. Borden because Mr. Borden “is at high risk for substance use, addictive behavior, or cognitive consequences, in the absence of close 24-hour structured support” and because Mr. Borden “has insufficient resources and skills to maintain an adequate level of functioning outside of a 24-hour supportive environment.” (PSI, p.33.)

Mr. Borden made multiple attempts both before and at sentencing in these cases to be released into an in-patient substance abuse treatment program that he had made arrangements to be enrolled into. (No. 48391 R., pp.57-59, 89-90, 95-103; No. 48392 R., pp.38-40, 66-67, 72-80; Tr. Vol. I, p.14, L.16—p.17, L.12.) While in custody for these cases, Mr. Borden enrolled in and

⁸ Mr. Borden indicated that he had been using methamphetamine daily for approximately two-and-a-half years leading up to his arrest, and that he smoked “2 grams a day.” (PSI, p.24.)

⁹ Mr. Borden stated that he had “used marijuana on all 90 days” in the preceding ninety days that he was out of custody. (PSI, p.25.) The GAIN assessment gave Mr. Borden a provisional diagnosis for cannabis use disorder moderate. (PSI, pp.23-24.)

completed the “life change program” offered at the Kootenai County jail. (No. 48391 R., p.110; Tr. Vol. I, p.18, Ls.12-20.)

The presentence investigator determined that “Mr. Borden has a hope and a focus for the future he has never had before. Observing jail communications between the defendant and his wife and child, show a positive and kind individual, happy to have the contact while in custody, and hopeful to engage as a husband and father upon his release.” (PSI, p.20.) After summarizing Mr. Borden’s troubled childhood, the presentence investigator noted that Mr. Borden’s “experiences are not justification for bad choices, but they are wounds and scars that, unless treated properly, will continue to affect” Mr. Borden. (PSI, p.20.) Despite Mr. Borden’s “criminal history, the severity of the instant offenses, and a desire to protect the community”, the presentence investigator concluded that “a more thoughtful and change-oriented path, may very well be a less incarceration minded sentence and a more rehabilitative focused sentence” and therefore found that Mr. Borden could be “an acceptable candidate for an order of retained jurisdiction coupled with intensive treatment and counseling.” (PSI, pp.20-21.)

Mr. Borden’s drug addiction and willingness to participate in treatment was a mitigating factor that, in light of the new information presented at the Rule 35 hearing, supported his requested restructuring of his sentences.

Second, the support and good character letters from Mr. Borden’s family stood in favor of mitigation. *State v. Shideler*, 103 Idaho 593, 594–95 (1982) (reducing defendant’s sentence upon a finding of family support and good character as mitigation); *see State v. Ball*, 149 Idaho 658, 663–64 (Ct. App. 2010) (finding that the district court acknowledged family and friend support as mitigating circumstances). Mr. Borden’s step-grandmother, uncle, and wife all wrote letters in support of him prior to sentencing. (No. 48391 R., pp.108-114.) Mr. Borden’s step-

grandmother informed the district court that Mr. Borden “has a very strong support system here in Colorado” and that Mr. Borden would “have all the family support” that he previously lacked. (No. 48391 R., p.111.) Mr. Borden’s uncle wrote that “[d]espite all the years of drug use, and his upbringing”, Mr. Borden had “made it very clear” that “he intends to change his life for the better.” (No. 48391 R., pp.112-13.) Mr. Borden’s wife reported that she “truly believe[s] my husband wants and very much needs rehabilitation assistance”, that Mr. Borden “is committed to turning his life around”, that she “fully supports drug treatment” for Mr. Borden, and that she would “do everything in [her] power to help achieve success.”¹⁰ (No. 48391 R., p.114.)

In sum, Mr. Borden maintains that the district court did not exercise reason in denying his motions to reduce his sentences. Proper consideration of the new information presented in light of Mr. Borden’s family support and willingness to participate in treatment supported a more lenient sentence. Mr. Borden submits that the district court abused its discretion in denying his motions to his reduce sentences in these cases.

CONCLUSION

Mr. Borden respectfully requests that this Court reduce his sentences or remand these cases to the district court as it deems appropriate.

DATED this 24th day of June, 2021.

/s/ Jacob L. Westerfield
JACOB L. WESTERFIELD
Deputy State Appellate Public Defender

¹⁰ In the letters, Mr. Borden was also described as being someone who “loves his wife and children unconditionally”, is “a loving father and husband”, and “has a big heart an [sic] soul and is a hard working man that would do anything to take care of his family.” (No. 48391 R., pp.111-14.) At the time of sentencing, Mr. Borden’s son was around eight months old. (No. 48391 R., p.114; PSI, p.13.) Mr. Borden also had a father-like role with his wife’s [REDACTED] [REDACTED] from a previous relationship. (No. 48391 R., p.114.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of June, 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

JLW/eas