

FILED _____

AT _____ O'clock ___ M
CLERK, DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,)
)
)
Plaintiff,)
)
vs.)
)
)
VIRGIL RAY SHIFFLET, III)
)
)
Defendant.)
)
)
)
_____)

Case No. **CRF 2009 21259**
CRF 2011 4623

**ORDER DENYING I.C.R. 35
MOTION AND NOTICE OF
RIGHT TO APPEAL**

On May 13, 2010, VIRGIL RAY SHIFFLET, III, was sentenced in Kootenai County
Case No. CRF 2009 21259, as follows:

CRF 2009 21259 - ROBBERY, (a felony), Idaho Code § I. C. 18-6501, 6502, committed on OCTOBER 11, 2009 – to the custody of the Idaho State Board of Correction for a fixed term of THREE (3) years followed by an indeterminate term of SEVEN (7) years, for a total term not to exceed TEN (10) years.

Kootenai County Case No. CRF 2009 21259, Sentence Disposition, p. 2. The Court imposed sentence but retained jurisdiction for a year. On June 8, 2010, a Motion for Reconsideration of Sentence Pursuant to I.C.R. 35 was filed by Shifflet’s attorney. This motion was never noticed up for hearing. An Amended Sentence Disposition was filed on July 1, 2010, to comply with the statutory changes to I.C. § 19-2604 which to effect on that date. On December 13, 2010, at Shifflet’s jurisdictional review hearing, this Court suspended that sentence and placed Shifflet on four years of supervised probation. Less than four months later, on March 16, 2011, Shifflet committed a new felony crime of

Aggravated Battery (Kootenai County Case No. CRF 2011 4623) , and on March 31, 2011, a Report of Probation Violation in Kootenai County Case No. CRF 2009 21259, dated March 30, 2011, was filed based on that new offense. On April 5, 2011, this Court issued a bench warrant in Kootenai County Case No. CRF 2009 21259. On July 1, 2011, Shifflet was apprehended. Shifflet requested continuances three times, and on November 17, 2011, denied the allegations of the probation violation. After another continuance of his evidentiary hearing, Shifflet finally pled guilty to the new charge and admitted the allegations of the probation violation. On February 14, 2012, this Court sentenced Shifflet as follows:

CRF 2011 4623 – AGGRAVATED BATTERY, I.C. § 18-903, 18-907, (a felony), committed on March 16, 2011 – to the custody of the Idaho State Board of Correction for a fixed term of SEVEN (7) years followed by an indeterminate term of EIGHT (8) years, for a total term not to exceed FIFTEEN (15) years.

This sentence ran consecutive to the previous Robbery sentence, and this Court again retained jurisdiction again for a year. On July 31, 2012, Shifflet returned for his jurisdictional review hearing, and Shifflet asked for a continuance. The Idaho Department of Corrections recommended relinquishing jurisdiction due to Shifflet's poor performance on this retained jurisdiction, specifically regarding anger issues which was the reason Shifflet was sent on a second retained jurisdiction. The Court continued the hearing to October 23, 2012, and at that hearing this Court relinquished its jurisdiction and imposed the sentences previously imposed, but modified the Aggravated Battery sentence to three years fixed followed by five years indeterminate. Retained Jurisdiction Disposition, p. 2. These sentences were imposed consecutive to each other. *Id.* The sole reason for the reduction of Shifflet's sentence by this Court was to allow Shifflet to get into programming aimed at helping his anger issues sooner, rather than later. In that regard, Shifflet has

already had a reduction similar to that which he now seeks in the I.C.R. 35 motions.

On January 24, 2013, Shifflet, through counsel, filed the instant I.C.R. 35 Motion in each of his two cases, requesting that "...the Court to reconsider the Retained Jurisdiction Disposition and Notice of Right to Appeal entered herein on October 23, 2012." Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, p. 1. Shifflet bases this motion on "...a plea for leniency. *Id.* No additional reasons are set forth for the motion, no alleged facts, new evidence or changed circumstances are given in the motion. Counsel for Shifflet requested a hearing in that motion (*Id.*), but did not notice such for hearing.

While Shifflet requested a hearing, a motion to modify a sentence "shall be considered and determined by the court without the admission of additional testimony and without oral argument, unless otherwise ordered by the court in its discretion." I.C.R. 35; *see State v. Copenhagen*, 129 Idaho 494, 496, 927, P.2d 884, 886 (1996); *State v. James*, 112 Idaho 239, 242, 731 P.2d 234, 237 (Ct.App. 1986) (it is the defendant's burden to present any additional evidence and the court cannot abuse its discretion in "...unduly limiting the information considered in deciding a Rule 35 motion"); *State v. Puga*, 114 Idaho 117, 118, 753 P.2d 1263, 1264 (Ct.App. 1987). Even though a hearing was requested, "[t]he decision whether to conduct a hearing on an I.C.R. 35 motion to reduce a legally-imposed sentence is directed to the sound discretion of the district court." *State v. Peterson*, 126 Idaho 522, 525, 887 P.2d 67, 70 (Ct.App. 1994); *citing State v. Findeisen*, 119 Idaho 903, 811 P.2d 513 (Ct.App. 1991). The Court has reviewed the Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, the Court minutes and the pre-sentence report. There is nothing that could be presented at a hearing that would be of benefit to the Court. A hearing would only waste counsel and the Court's time.

A motion to reduce sentence is a motion for leniency. *State v. Strand*, 137 Idaho

457, 463, 50 P.3d 472, 478 (2002); *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). The decision to grant or deny leniency is left to the sound discretion of the court. *Id, Strand*; *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct.App. 1989)

A motion to reduce an otherwise lawful sentence is addressed to the sound discretion of the sentencing court. *State v. Arambula*, 97 Idaho 627, 550 P.2d 130 (1976). Such a motion is essentially a plea for leniency, which may be granted if the sentence originally imposed was unduly severe. *State v. Lopez*. 106 Idaho 447, 680 P.2d 869 (Ct.App. 1984).

* * *

However, if the sentence is not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with his motion.

State v. Forde, 113 Idaho 21, 22, 740 P.2d 63 (Ct. App. 1987). See also *State v. Adams*, 137 Idaho 275, 278, 47 P.3d 778, 781 (Ct.App. 2002).

For a sentence to be considered “reasonable” at the time of sentencing the court must consider the objectives of sentencing: whether confinement is necessary to accomplish the objective of protection of society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution applicable to the case. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct.App. 1982). This requires the court focus on “...the nature of the offense, the character of the offender, and the protection of the public interest.” *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct.App. 1982).

This Court allowed Shifflet the benefit of probation following a period of retained jurisdiction, during which time Shifflet was given programming to allow him to be successful on probation. After the period of retained jurisdiction Deems violated his probation in short order by committing another serious felony, *while on felony probation*, and by absconding. After nine months in jail, due to Shifflet’s continuances, the Court attempted to provide Shifflet with the rehabilitation he needed, through yet another period of retained jurisdiction. Unfortunately, Shifflet did very poorly on that more recent period of retained jurisdiction. The danger to the public with Shifflet being placed on probation

is obvious.

The sentences imposed on May 13, 2010, and on February 14, 2012, were and are appropriate sentences given Shifflet's social and criminal history and the crimes for which sentence was imposed. A lesser sentence would depreciate the seriousness of Shifflet's crimes. This Court concludes that the sentences imposed were and are necessary for the protection of society and the deterrence of Shifflet and others.

IT IS THEREFORE ORDERED that Shifflet' I.C.R. 35 Motion is **DENIED**.

NOTICE OF RIGHT TO APPEAL

YOU, VIRGIL RAY SHIFFLET, III, ARE HEREBY NOTIFIED that you have a right to appeal this order to the Idaho Supreme Court. Any notice of appeal must be filed within forty-two (42) days of the entry of the written order in this matter.

YOU ARE FURTHER NOTIFIED that if you are unable to pay the costs of an appeal, you have the right to apply for leave to appeal in forma pauperis or to apply for the appointment of counsel at public expense. If you have questions concerning your right to appeal, you should consult your present lawyer, if any.

DATED this 28th day of February, 2013.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of February, 2013 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney - J. Lynn Brooks
Prosecuting Attorney -

VIRGIL RAY SHIFFLET, III
IDOC # 96406

Probation & Parole

Idaho Department of Correction
Records Division (certified copy)
Fax: (208) 327-7445

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____, Deputy