

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.)
)
)
JERRY LEONARD ELLIS, III)
DOB: 02/14/1965)
SSN: ***-**-3658)
IDOC: 59188)
)
Defendant.)

Case No. **CRF 2006 34**
CRF 2009 20230

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

I. THE ORIGINAL I.C.R. 35 MOTION OF JERRY LEONARD ELLIS, III.

On November 8, 2006, JERRY LEONARD ELLIS, III (Ellis) was sentenced by the Honorable Fred M. Gibler as follows:

**CRF 2006 34 -OPERATING A MOTOR VEHICLE WHILE UNDER THE
INFLUENCE OF ALCOHOL AND/OR AN INTOXICATING SUBSTANCE –**
to zero (0) fixed and three and one half 3 ½ years indeterminate, total term
not to exceed three and one half 3 ½ years.

That sentence ran concurrent with the sentence that was previously imposed by Judge Gibler in CR 2005 18844 (a misdemeanor second offense driving under the influence). In CRF 2006 34, Judge Gibler placed Ellis on three and one half years of supervised probation and suspended his driving privileges absolutely for one year. On November 8, 2007, an Agent’s Warrant was issued because Ellis had been caught driving without privileges, harboring a fugitive, and using methamphetamine. While awaiting the evidentiary hearing on this probation violation, Ellis posted bond and on December 23, 2007, another Agent’s Warrant was issued, this one for *again* driving without privileges

(while still on probation and while out on bond pending the first probation violation) and for possessing and consuming alcohol on the same day and event as his driving without privileges. Ellis again posted bond, but then failed to appear for his January 23, 2008, hearing before Judge Gibler. Ellis was apprehended on the Bench Warrant on February 4, 2008. On March 12, 2008, Judge Gibler found Ellis had violated his probation as alleged, revoked his probation and sent Ellis on a retained jurisdiction. On July 25, 2008, following the retained jurisdiction program in prison, Judge Gibler placed Ellis back on probation for two years. Within two weeks a Report of Probation Violation was filed on August 8, 2008, alleging Ellis consumed alcohol on August 7, 2008, testing at a .16 BAC, testing positive for methamphetamine the same date, and failing to attend his probation appointment on August 6, 2008. Judge Gibler agreed to give Ellis another chance and held status conferences periodically while deferring disposition on his new probation violations. On March 19, 2009, Judge Gibler kept Ellis on probation. On September 10, 2009, due to additional probation violations, a new Report of Probation Violation was filed, alleging that on September 6, 2009, Ellis was arrested for a new felony Driving Under the Influence charge. As a result of that probation violation, on April 26, 2010, Judge Gibler revoked Ellis' probation and sent Ellis on another period of retained jurisdiction.

On April 26, 2010, JERRY LEONARD ELLIS III (Ellis) was sentenced by the Honorable Fred M. Gibler as follows:

CRF 2009 20230 - OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL AND/OR AN INTOXICATING SUBSTANCE - to five (5) years fixed and five (5) years indeterminate, total term not to exceed ten (10) years.

That sentence ran concurrent with the sentence that was previously imposed by Judge Gibler in CRF 2006 34. In both CRF 2006 34 and CRF 2009 20230, Judge Gibler placed Ellis on another period of retained jurisdiction. In CRF 2009 20230, Judge Gibler

suspended his driving privileges absolutely for the maximum five years.

On October 12, 2010, Judge Gibler placed Ellis on supervised probation for three years, in both cases. Two months later, on December 14, 2010, Ellis served seven days discretionary jail time for consuming alcohol. On January 21, 2011, a Report of Violation was filed for Ellis violating the law by obtaining another felony Driving Under the Influence arrest on January 19, 2011, (while Ellis had no valid license Ellis was not cited for driving without privileges), consuming alcohol, buying alcohol, associating with felons not approved by his probation officer, failing to drug test, failing to attend rehabilitation and failing to attend his probation officer's scheduled appointments. In the Report of Violation, Ellis' probation officer simply recommended that Ellis' suspended sentences be imposed and that he be sent to prison to serve out those sentences. On June 10, 2011, Judge Gibler kept Ellis on probation, but added the term and condition of probation (to both cases) that he "successfully complete the Mental Health Drug Court program."

On June 23, 2011, Ellis attended his first session of Mental Health Court. Both cases were assigned to the undersigned judge, who presides over the Kootenai County Mental Health Court. In his first week Ellis missed an appointment. His second week he missed a call in to treatment and was sanctioned with an essay. His third week he missed another call in and was sanctioned with community service. He then had three weeks without a sanction. On his seventh week, on August 11, 2011, Ellis relapsed on alcohol, for which he served two days in jail. Ellis missed a call in on August 23, 2011. On September 1, 2011, Ellis drug tested late. On September 12, 2011, Ellis tested positive for alcohol, lied to his probation officer, missed Dialectical Behavioral Therapy, and was late for Matirx, for which he was sent to jail for 28 days. The week after he was released, on October 20, 2011, Ellis failed to show for a drug/alcohol test; he was given an essay. Ellis then had a few good weeks, but on November 22, 2011, he served

seven days in jail for obtaining the new charge of driving without privileges. The Mental Health Court team voted to terminate Ellis from the Mental Health Court program. On December 15, 2011, the undersigned imposed both sentences and sent Ellis on another period of retained jurisdiction, specifically recommending the Idaho Department of Correction place Ellis in the CAPP program to address Ellis' addiction. This Court also ordered that if Ellis completed that retained jurisdiction program successfully, Ellis would need to begin Mental Health Court all over again, if he were to be considered appropriate by the Court for probation.

On May 17, 2012, this Court placed Ellis back on probation, this time for seven years. Ellis was ordered back into Mental Health Court. In Ellis' first week he had a dilute urinalysis test result and was sanctioned with an essay. In Ellis' third week he relapsed and was ordered to serve fourteen days in jail and move out of his mother's house. On September 6, 2012, Ellis finally obtained a job. On September 20, 2012, Ellis missed a drug/alcohol test and missed appointments, for which Ellis was sanctioned with three days on the Sheriff's Labor Program. Ellis had some good weeks, then missed a drug/alcohol test on November 1, 2012. Ellis had a dilute and missed a drug/alcohol test on November 29, 2012, for which he did one day in jail and was told termination from the Mental Health Court was being considered. On December 6, 2012, Ellis consumed alcohol, missed another drug/alcohol test and was given seven days in jail following which he had to test every day for a week. When he was released from jail, Ellis was given a SCRAM bracelet (to monitor alcohol consumption and location) and 6 p.m. curfew. Ellis immediately used alcohol (as verified by bracelet) but denied such use. On January 3, 2013, Ellis was placed back into custody until he admitted to such use. On January 10, 2013, Ellis admitted consuming alcohol, he was released the following week on January 17, 2013. Within the next week, Ellis missed a drug test.

The following week Ellis showed as having tampered with his SCRAM bracelet. On February 28, 2013, Ellis was charged with a new violation of I.C. § 18-8001, driving without privileges. On March 7, 2013, the Mental Health Court team voted to terminate Ellis from the Mental Health Court program. On March 21, 2013, this Court revoked Ellis' probation in both cases and imposed the sentences originally set by Judge Gibler.

On April 3, 2013, Ellis, through his then public defender, Jedediah J. Whitaker, filed the instant "Motion for Reconsideration of Sentence Pursuant to I.C.R. 35", requesting that "the Court reconsider the Judgment and Sentence entered herein on March 21, 2013." Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, p. 1. Ellis based this motion on "a plea for leniency." *Id.* In Ellis' I.C.R. 35 Motion he requested a hearing. *Id.* Although it was incumbent upon Ellis to notice such a hearing, Ellis failed to do so. On October 31, 2013, this Court *sua sponte* scheduled the I.C.R. 35 Motion for hearing on November 5, 2013. As of this time, Ellis now had private counsel, Henry D. Madsen appearing for him. Oral argument was held on November 5, 2013. Ellis appeared telephonically from prison. A motion to have Ellis transported back to the Kootenai County jail was made by Ellis' attorney, but denied by this Court as no good basis for such relief was articulated by Ellis.

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). The Court allowed evidence and oral argument at the November 5, 2013, hearing. No argument was made by Ellis' attorney Henry D. Madsen. From the extensive evidence presented, which consisted of testimony from Good Samaritan Rehabilitation that there was an eighty percent chance of successfully treating Ellis' alcoholism (which the Court specifically found not to be credible), it seemed that what Ellis was actually seeking in his I.C.R. 35 Motion was not a reduction in his sentence (which is what his motion requested), but rather a reconsideration of this Court's decision to revoke probation and actually impose his sentences.

At the conclusion of that hearing on November 5, 2013, the Court announced that the Court was denying Ellis the relief he requested, denying Ellis' Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, and *ordered Henry D. Madsen, counsel for Ellis to prepare an Order Denying Ellis' I.C.R. 35 Motion*. At all times since, *Henry D. Madsen has failed to comply with that Order of the Court*. Because Mr. Madsen has failed to comply with an Order of this Court, this Court now prepares such Order.

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 to 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).

The sentences imposed on November 8, 2006 and on April 26, 2010, are appropriate sentences given Ellis' social and criminal history and the crimes for which his sentences were imposed. Any lesser sentences would depreciate the seriousness of Ellis's crimes. This Court concludes that the sentences imposed were and are necessary for the protection of society and the deterrence of Ellis and others. Ellis has had thirteen driving under the influence charges, three of them felonies, and one of them involving bodily injury. In spite of all the rehabilitative efforts, Ellis chooses to drink alcohol and chooses to drive when he has no legal ability to drive a motor vehicle. The only way to protect the public is by imposition of his prison sentences. Additionally, the Court finds no reason to reconsider its decision to revoke Ellis' probation and impose these prison sentences. The Court finds the testimony of Mr. Barnhill of the Good Samaritan Program, that Ellis would have an 80% chance of being successful in his recovery following the Good Samaritan Program, to be entirely without merit and incredible. Ellis has had a documented history the last decade of intense programming including two retained jurisdiction programs followed by two stints in the Mental Health Court program, yet he refuses to stop drinking and he refuses to stop driving a motor vehicle when at all times he has lacked the legal ability to do so.

II. THE SUBSEQUENT I.C.R. 35 MOTION OF JERRY LEONARD ELLIS, III FILED ON DECEMBER 16, 2013.

On December 16, 2013, Ellis, pro se, filed a “Motion for Reconsideration of I.C.R. Rule 35 hearing on November t, 2013, held at 11 am.” Essentially, this is a Motion to Reconsider the denial of a Motion to Reconsider. Ellis is not allowed to do this because that would amount to a successive I.C.R. 35 motion, which is prohibited. *State v. Heyrend*, 129 Idaho 568, 929 P.2d 744 (Ct.App. 1996). Thus, this second motion filed by Ellis must be denied.

On December 16, 2013, Ellis also filed a “Motion for Hearing” on his second I.C.R. 35 Motion, as well as a “Motion and Affidavit in Support for Appointment of Counsel” for such I.C.R. 35 Motion. Because the second I.C.R. 35 is illegal, the motion for hearing and motion for appointment of counsel must be denied as well.

III. ORDER.

IT IS THEREFORE ORDERED that Ellis' I.C.R. 35 Motion filed on April 3, 2013, is **DENIED**.

IT IS FURTHER ORDERED that Ellis's I.C.R. 35 Motion filed on December 16, 2013, **DENIED**, as it is a prohibited successive I.C.R. 35 Motion. Ellis' motion for hearing and motion for appointment of counsel regarding this second I.C.R. 35 Motion are both **DENIED** as the I.C.R. 35 Motion itself is illegal and cannot be considered by this Court.

NOTICE OF RIGHT TO APPEAL

YOU, JERRY LEONARD ELLIS, 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 2nd day of January, 2014.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of January, 2014 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney – Henry D. Madsen
Courtesy copy to Jed Whitaker
Prosecuting Attorney – Art Verharen
Hon. Fred M. Gibler
Mary Wolfinger, MHC Coordinator

JERRY LEONARD ELLIS III
IDOC # 59188
15505 South Pleasant Valley Road
Kuna, ID 83634

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

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____, Deputy

Probation & Parole, Greg Willey