

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.)
)
ANGEL MARIE COLE)
DOB: 09/07/1986)
SSN: XXX-XX-8220)
IDOC: 117629)
)
)
Defendant.)

Case No. **CRF 2015 14693**

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

On April 19, 2016, ANGEL MARIE COLE was sentenced as follows:

POSSESSION OF A CONTROLLED SUBSTANCE
(METHAMPHETAMINE), (a felony), Idaho Code 37-2732©(1) committed on September 4, 2015 – to the custody of the Idaho State Board of Correction for a fixed term of THREE (3) years followed by an indeterminate term of FOUR (4) years, for a total term not to exceed SEVEN (7) years.

The Court suspended that sentence and placed Cole on supervised probation for four years. Just a few weeks later, Cole violated her probation by failing to show up for Mental Health Court on June 9, 2016. Accordingly, this Court issued a bench warrant. Several weeks after that, a Report of Violation was filed dated July 27, 2016, alleging Cole violated her probation by not staying at her assigned residence, by committing new crimes, by not showing up for mental health court, and by absconding from probation. On September 2, 2016, Cole was apprehended on the bench warrant. On September 15, 2016, Cole admitted violating her probation as alleged. The Court imposed Cole's prison sentence and retained jurisdiction for up to one year, recommending that the Idaho

Department of Correction (IDOC) provide her with chemical dependency treatment, cognitive restructuring, any treatment available for her extensive past trauma, and to mental health treatment. The Court expected Cole to enter into Mental Health Court upon her return from the retained jurisdiction.

On March 14, 2017, the IDOC issued a report recommending probation, but upon reading that report it was clear Cole had done an abysmal job abiding by IDOC's rules while on the retained jurisdiction. On April 5, 2017, this Court held a jurisdictional review hearing. At the conclusion of that hearing the Court gave Cole a choice, she could return to her retained jurisdiction (there was still over five months left on the one year maximum period), try to improve her conduct and get a recommendation for probation, or, the Court could impose her prison sentence. Cole responded that she did not want to do her rider, that she would rather have her prison sentence imposed. The Court imposed her prison sentence. On April 20, 2017, Cole, through counsel, filed the instant I.C.R. 35 Motion requesting that this Court amend "the imposed sentence to a lesser amount." I.C.R. 35 Motion, 1. Counsel for Cole provides no basis for Cole's motion, but the Court infers such to be based on a plea for leniency. In that motion, counsel for Cole did not request a hearing. *Id.*

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. Copenhaver*, 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 I.C.R. Motion, the Court minutes from the various hearings, the pre-sentence report, and the addendum to the presentence report from IDOC. 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. COLE’S MOTION IS TIME BARRED AS IT IS UNTIMELY FILED.

The Idaho Court of Appeals has held that a sentence is “imposed” within the meaning of Rule 35 when it is originally pronounced. The 120-day period for seeking Rule 35 relief runs from that date, not from the subsequent date when jurisdiction retained under I.C. § 19-2601(4) is relinquished. *State v. Salsgiver*, 112 Idaho 933, 934-35, 736 P.2d 1387, 1388-89 (Ct. App. 1987). The 120-day period for filing for relief under Rule 35 begins running from the initial pronouncement of the sentence, not from the time probation is revoked and the original suspended sentenced is reinstated. *State v. Liggins*, 113 Idaho 62, 63-64, 741 P.2d 349, 350-51 (Ct. App. 1987).

Sentence in this case were imposed on April 19, 2016. Cole’s time to file a motion under I.C.R. 35 ended about August 19, 2016. Thus, Cole’s motion filed April 20, 2017, is time barred by about eight months. Accordingly, Cole’s motion must be denied as it is time barred.

B. COLE HAS NOT SET FORTH A VALID BASIS FOR HER MOTION, NOR HAS COLE SET FORTH ANY EVIDENCE TO SUPPORT HER MOTION.

Where a sentence as originally imposed is not illegal, the defendant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2nd 482, 490 (1992). “To establish that the sentence

imposed was improper, the defendant must show that in light of the governing criteria, [the] sentence was excessive under any reasonable view of the facts.” *Id.* (quoting *State v. Broadhead*, 120 Idaho 141, 143-45, 814 P.2d 401, 403-05 (1991) (citations omitted)).

When a defendant does not identify what evidence he or she might have produced at a hearing that could not have been produced through affidavits, the district court does not abuse its discretion in refusing to hold a hearing on his Rule 35 motion. *State v. Ramirez*, 122 Idaho 830, 836, 839 P.2d 1244, 1250 (Ct. App.1992). Specifically, the Idaho Court of Appeals held:

This Court has previously held that while a defendant is entitled to be present at sentencing and at resentencing when a prior invalid sentence is corrected, no such right exists on a motion to reduce a sentence. *State v. James*, 112 Idaho 239, 242, 731 P.2d 234, 237 (Ct. App.1986). “Indeed, the decision whether even to conduct a hearing on a Rule 35 motion has always been discretionary with the district court.” *Id.* A trial court abuses its discretion on whether to hold a hearing on a Rule 35 motion when it unduly limits information considered in deciding the motion. *James*, 112 Idaho at 242, 731 P.2d at 237. Ramirez has failed to show that the district court unduly limited the available information in this case. Ramirez does not even identify what evidence he might have produced at a hearing that he was unable to produce through the affidavits which were submitted.

Id. (footnote omitted). Here, counsel for Cole has not only not set forth any evidence that could be adduced, counsel for defendant still fails to state the basis for the Rule 35 Motion other than as a claim for a reduction in her sentence which is based on an inference by the Court as being based on leniency. The Court cannot be required to guess at what evidence Cole might present in support of her Rule 35 Motion. Because Cole has failed to set forth the basis for her motion other than as a claim for leniency, and because she has completely failed to give any indication of any fact which would support her claim, her Rule 35 Motion must be denied due to that failure.

C. COLE’S MOTION HAS NO MERIT.

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. *Strand*, 137 Idaho at 463, 50 P.3d at 478. *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, 64 (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 Court finds Cole’s sentence imposed on April 19, 2016, was reasonable. On the date of sentencing, the Court, through the Presentence Report, was aware of Cole’s fairly extensive prior criminal record; she was convicted of felony tampering and fabricating evidence and possession of a controlled substance in 2009, and she was convicted of the following misdemeanors; possession of marijuana in 2005, assault causing bodily injury in 2008, prostitution in 2008, failure to identify in 2009, prostitution in

2013 and battery in 2015. Cole has an extensive drug problem Cole has extensive past trauma in her life. Cole has mental health issues. At the time of this offense on September 4, 2015 , Cole was homeless. Cole admitted to selling drugs and prostitution to support herself and that she had cooked crack cocaine. Presentence Report, p. 10. Prior to sentencing, Cole failed to appear for her presentence interview. Prior to sentencing, Cole failed to show for court-ordered weekly random drug testing. All these factors support the Court's sentence. When the Court gave Cole the benefit of probation, and she immediately absconded. Once she was apprehended, due to the severity of her various problems and her inability to follow the Court's orders, the Court felt on September 15, 2016, that Cole needed drug treatment in a custodial environment, hence, the retained jurisdiction. But then, Cole committed numerous rule violations. When given the choice between serving her prison sentence and attempting to rectify her retained jurisdiction, Cole chose the former.

The sentence imposed on April 19, 2016, takes into consideration not only the serious nature of her offense committed on September 4, 2015 (possession of methamphetamine and a pipe), but also her prior record and her failures to comply with court orders prior to sentencing. The sentence imposed is appropriate. The decision to place Cole on a retained jurisdiction is supported by Cole's immediately absconding from probation. That decision is appropriate. As far as the decision to impose her sentence, the Court was faced with a person who had failed to comply with this Court's orders prior to sentencing, immediately absconded from probation and thus, a person who needed treatment but refused to be safely treated in the community, and when offered treatment in the prison system, refused to follow the orders of the IDOC. When given the choice between prison and further attempts to rehabilitate, Cole chose prison. The decision to impose prison was appropriate. A lesser sentence would depreciate the seriousness of

Cole's crimes. This Court concludes that the sentence imposed was and is necessary for the protection of society and the deterrence of Cole and others.

D. NO HEARING IS NEEDED.

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. Copenhaver*, 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 I.C.R. 35 Motion, the Court minutes, the previous Report of Probation Violation, the pre-sentence report and the addendum to presentence 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.

E. ALTERNATIVE RELIEF NOT SOUGHT BY COLE.

The Court notes that there is still five months left on the period of her retained jurisdiction (not counting the additional 30 days allowed under I.C. § 19-2601(4)), and if Cole were to reconsider her decision to choose prison over completion of her retained jurisdiction, the Court remains willing to ask the IDOC to accept her back to complete her period of retained jurisdiction. This Court acted quickly on Cole's I.C.R. 35 Motion in

order to preserve as much of that time as possible. However, at the present time, Cole has made no such request.

IT IS THEREFORE ORDERED that Cole's I.C.R. 35 Motion to Reconsider Sentence Pursuant to I.C.R. 35 is **DENIED**.

NOTICE OF RIGHT TO APPEAL

YOU, ANGEL MARIE COLE, 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 24th day of April, 2017.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of April, 2017 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney – Douglas Pierce
Prosecuting Attorney -

ANGEL MARIE COLE
IDOC # 117629

Probation & Parole

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

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____, Deputy