

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.)
)
PARKER COLE MALONEY)
DOB: 12/18/1982)
SSN: XXX-XX-2856)
IDOC: 64188)
)
Defendant.)

Case No. **CRF 2015 8831**

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

I. PROCEDURAL HISTORY.

On October 6, 2015, PARKER COLE MALONEY (Maloney) was sentenced as follows:

DOMESTIC BATTERY IN THE PRESENCE OF A CHILD, (a felony), Idaho Code § 18-903, 28-918(4)(5), committed on June 10, 2015 – to the custody of the Idaho State Board of Correction for a fixed term of EIGHT (8) years followed by an indeterminate term of TWO (2) years, for a total term not to exceed TEN (10) years.

Sentencing Disposition and Notice of Right to Appeal, 2. This Court retained jurisdiction, requested the State of Idaho Department of Correction provide him with anger treatment, and required Maloney to have a plan for either Good Samaritan or 24/7 programs (two long-term faith-based residential addiction treatment programs in Kootenai County). On May 25, 2016, the Court placed Maloney on supervised probation for three years, requiring him to attend treatment at 24/7 but he did not have to live at 24/7. On June 19, 2017, this Court issued an Order to Show Cause, ordering Maloney to appear for hearing

on July 27, 2017, alleging Maloney failed to complete his 100 hours community service requirement by the June 1, 2017, deadline. By this time, the Court had also reviewed: a) a Notice of Arrest (use of discretionary jail time) dated September 12, 2016, for 1) Maloney's failure to report on August 21, 2016, for his prescheduled polygraph examination as directed by his probation officer, and 2) Maloney's failure to report for urinalysis testing on August 24, 2016, August 29, 2016, and September 7, 2016; and, b) a Notice of Arrest (use of discretionary jail time) dated May 8, 2017, for: 1) Maloney's failure to retake his full disclosure polygraph examination as directed by his probation officer, and 2) Maloney's failure to attend domestic violence treatment classes on April 4, 2017, April 18, 2017, and April 25, 2017. On July 10, 2017, a Report of Violation was filed dated July 5, 2017. As a result of that Report of Violation, this Court issued a no bond bench warrant on July 18, 2017, which was served on Maloney on July 23, 2017. On July 25, 2017, an Amended Report of Violation was filed. On July 27, 2017, Maloney admitted Allegation No. 1, failing to complete his community service, and Maloney denied allegations 2-9.

An evidentiary hearing was held August 31, 2017, at which time Maloney admitted violating his probation as alleged in; Allegation No. 3, which alleged that on July 20, 2017, Maloney was arrested at a residence occupied by *****, when there was an active No Contact Order prohibiting him from having contact with *****; as alleged in Allegation No. 6, which alleged that Maloney failed to attend the intake and orientation class with the Amend Center (anger treatment) on August 17, 2016; and as alleged in Allegation No. 7, which alleged Maloney failed to attend drug testing on August 24, 2016, August 29, 2016, September 7, 2016, September 15, 2016, September 23, 2016, October 4, 2016, October 11, 2016, October 20, 2016, November 4, 2016, and November 9, 2016. The remaining allegations were withdrawn by the plaintiff, State of Idaho. At the conclusion of

that August 31, 2017, hearing, this Court imposed Maloney's sentence.

On September 11, 2017, Maloney, through counsel, filed the instant Motion for Reconsideration of Sentence Pursuant to I.C.R. 35 requesting "the Court to reconsider the Judgment and Sentence entered herein August 31, 2017." Maloney bases this motion on "a plea for leniency." No other information is set forth in Maloney's motion.

In his Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, Maloney requested a hearing. Indeed, a hearing on this motion was scheduled for October 31, 2017.

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 Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, the Court minutes, 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.

II. ANALYSIS.

A. MALONEY'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 sentence is reinstated. *State v. Liggins*, 113 Idaho 62, 63-64, 741 P.2d 349, 350-51 (Ct. App. 1987).

The sentence in this case was imposed on October 6, 2015. Maloney's time to file a motion under I.C.R. 35 ended about February 6, 2016. Thus, Maloney's motion filed September 11, 2017, is time barred by about nineteen months. Accordingly, Maloney's motion must be denied as it is time barred.

B. MALONEY HAS NOT SET FORTH A VALID BASIS FOR HIS MOTION, NOR HAS MALONEY SET FORTH ANY EVIDENCE TO SUPPORT HIS 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.2d 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 or her 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 Maloney 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 leniency. The Court cannot be required to guess at what evidence Maloney might present in support of his Rule 35 Motion. Because Maloney has failed to set forth the basis for his Motion other than as a claim for leniency, and because he has completely failed to give any indication of any fact which would support his claim, his Rule 35 Motion must be denied due to that failure.

C. MALONEY’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 Maloney’s sentence imposed on October 6, 2015, was reasonable. On the date of sentencing, the Court, through the Presentence Report, was aware of the following facts. Maloney had a lengthy prior criminal record, both as a juvenile and as an adult. As a juvenile he was convicted of: misdemeanor possession of a controlled substance for events that occurred on December 5, 1996; felony possession of a controlled substance for events that occurred on December 5, 1996; two counts of petit theft for events that occurred on February 6, 1998; petit theft and unlawful entry for events that occurred on March 30, 1998; and unlawful entry for events that occurred on April 4, 1998. Presentence Report 6-8. As an adult, Maloney was convicted of: driving with an invalid license for events that occurred on February 19, 1999; minor consuming alcohol for events that occurred on August 27, 2000; felony forgery for events that occurred on February 13, 2001; misdemeanor resisting and obstructing an officer for

events that occurred on March 24, 2001; minor consuming alcohol for events that occurred on May 5, 2001; driving without privileges for events occurring on August 1, 2002; driving without privileges for events occurring on October 23, 2002; minor consuming alcohol for events that occurred on June 29, 2003; hunting without a license for events that occurred on July 5, 2003; driving with an invalid license and failure to provide proof of insurance for events occurring on February 11, 2004; criminal trespass for events that occurred on April 6, 2004; driving with an invalid license for events that occurred on August 10, 2004; destruction of a telecommunications line for events that occurred on December 6, 2005; on April 6, two counts of driving without privileges for events that occurred on December 12, 2006; possession of drug paraphernalia and violation of a no contact order for events that occurred on January 12, 2008; violation of a no contact order for events that occurred on December 1, 2009; violation of a protection order for events that occurred on August 14, 2012; misdemeanor battery, domestic violence without traumatic injury against a household member for events that occurred on April 12, 2015, twenty eight days before the June 10, 2015, felony domestic battery at issue the present case. Presentence Report 8-19. Additionally, the summary of his criminal record shows numerous probation violations by Maloney over the years. Not listed on his Presentence Report summary of criminal record was a felony Domestic Battery for events that occurred on September 5, 2009. This Court is very familiar with that case, having presided over that case.

Most important to this Court was the fact that the victim in the instant case, *****, is the same victim in the 2009 domestic battery. On June 30, 2010, following a period of retained jurisdiction, this Court placed Maloney on probation in Kootenai County Case No. CRF 2009 18891 for four years. Thus, Maloney finished that probation on June 30, 2014, and just under a year later, committed the felony offense at issue.

The facts of the instant case show Maloney hit ***** in the face with his elbow, and when law enforcement arrived, Maloney was extremely aggressive with law enforcement.

The facts of the September 5, 2009, case are disturbing. The presentence report in the present case reiterates what occurred in that 2009 felony case:

Per the 2010 PSI official version, victim ***** said they had an argument and he tried to force her to have anal sex with him. He grabbed her, pulled her pants down, and pushed her face down onto the bed. He pinned down with his body and attempted to insert his penis into her rectum for approximately 30 minutes, but was not successful because she resisted. Once he gave up, she got up and exited the bedroom. She said she found her phone, but before she could use it, the Defendant grabbed her by the back of the neck and threw her to the floor. During the incident their three children were present. After calming down from this incident, the Defendant demanded they go for a drive. Upon their return, he insisted they go to bed. ***** said the Defendant told her she'd be fine if she dressed for bed. She took him at his word and began to undress; keeping her phone near her. As soon as she took off her pants though, he grabbed her again, pinned her down on the bed, and tried forcing anal sex upon her again – while she was crying and telling him no. After he stopped, he demanded she give him her phone, but she refused and he began choking her with both hands. Once she gave him the phone, he let go of her neck and let her up. When she tried to go to the front door, he pulled her away from it. She felt she couldn't leave because he was right by her side the whole time. The Defendant eventually gave her the phone back, but he took out the battery and kept it so she could not call 911. This incident went on until approximately 2330 hours and they went to bed. During the entire incident, the Defendant made several threats to ***** to the effect of, "I will knock you out before the cops show up." During questioning, the Defendant said he "really didn't remember what happened." He then said he was not proud of what occurred and admitted he had been drinking. When an officer asked why he took the victim's phone, the Defendant said, "So she could not call the police."

Presentence Report 10-11. In the present case, Maloney made no corrections to that account of the 2009 case. Aside from being disturbing, the facts of the 2009 case are relevant as they pertain to Maloney's probation violation where he admitted violating his No Contact Order by being at ***** residence. Additionally, the facts of the 2009 case are relevant as they pertain to Maloney's claims which he and his counsel both made at his August 31, 2017, probation violation disposition hearing in the present case. Maloney

and his attorney both took umbrage with the fact that the Idaho Department of Corrections classified Maloney as needing to be placed on the sex offender case load even though Maloney had not been convicted as a sex offender. At that hearing, IDOC Probation and Parole Officer Lori Rawson testified that Maloney's 2009 felony domestic battery had a sex-offense charge, infamous crime against nature, a felony. Rawson testified that even though that crime was later dismissed, it had bearing on how IDOC supervised Maloney. The Court made it clear that the decision by IDOC on how to supervise Maloney is an executive branch decision, over which this Court has no control. At that August 31, 2017, hearing, this Court cited *Ransom v. City of Garden City*, 113 Idaho 202, 743 P.2d 70 (1987) in which the Idaho Supreme Court, quoting the Alaska Supreme Court, held: "The judicial branch lacks the fact-finding ability of the legislature, and the special expertise of the executive departments.... [Courts] should not attempt to balance the detailed and competing elements of legislative or executive decisions." *Ransom*, 113 Idaho at 205, 743 P.2d at 73, citing *Industrial Indem. Co. v. State*, 669 P.2d 561, 563 (Alaska 1983). At that August 31, 2017, hearing, this Court also cited to this Court's June 2, 2015, Order Denying Defendant's Motion to End Probation or Reduce Terms of Probation in *State v. Kilo LeVeque*, Kootenai County Case No. CRF 2013 11265, in which this Court discussed that issue in detail, specifically as it pertains to the State of Idaho Department of Correction as to how they supervise their offenders.

The sentence imposed on October 6, 2015, takes into consideration not only the serious nature of the offense committed on June 10, 2015, and takes into consideration Maloney's lengthy and disturbing record. The decision by this Court on August 31, 2017, when this Court *imposed* the sentence handed down on June 10, 2015, is appropriate given Maloney's social and criminal history and the nature of the crime for which sentence was imposed, coupled with his dismal performance on probation. As far as the decision

to impose Maloney's sentence, the Court was faced with a person who had failed to engage in treatment, failed his probation officer's directives, failed to abide by this Court's orders, the most important of which was the No Contact Order in effect in favor of *****. Maloney simply cannot be safely treated in the community. If what Maloney is wanting this Court to reconsider is its decision on August 31, 2017, this Court concludes that imposition of the original sentence was and is necessary for the protection of society and the deterrence of Maloney and others.

III. ORDER.

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

IT IS FURTHER ORDERED that the hearing scheduled for October 31, 2017, is **VACATED**.

NOTICE OF RIGHT TO APPEAL

YOU, PARKER COLE MALONEY, 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 25th day of November, 2017.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

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

Defense Attorney - Christopher Schwartz
Prosecuting Attorney -

PARKER COLE MALONEY
IDOC # 64188

Probation & Parole

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

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____, Deputy