

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.)
)
ERIC MICHAEL ROSS)
DOB: 12/14/1972)
SSN: XXX-XX-6589)
IDOC: 113901)
)
Defendant.)

Case No. **CRF 2014 7016**

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

On January 20, 2015, ERIC MICHAEL ROSS was sentenced by this Court as follows:

COUNT I - UNLAWFUL POSSESSION OF A FIREARM, (a felony), I. C. 18-3316, committed on April 16, 2014 – to the custody of the Idaho State Board of Correction for a fixed term of FOUR (4) years followed by an indeterminate term of ONE (1) year, for a total term not to exceed FIVE (5) years.

COUNT II - TRAFFICKING IN METHAMPHETAMINE OR AMPHETAMINE, (a felony), Idaho Code § I. C. 37-2732B(a)(4) committed on April 16, 2014 – to the custody of the Idaho State Board of Correction for a fixed term of FOUR (4) years followed by an indeterminate term of SEVEN (7) years, for a total term not to exceed ELEVEN (11) years.

THESE SENTENCES RUN CONCURRENTLY.

On April 2, 2015, Ross, *pro se*, filed the instant “Motion for Reduction or Correction of Sentence, ICR 35” (I.C.R. 35 Motion) requesting leniency. Motion for Reduction or Correction of Sentence, ICR 35, p. 2. At the same time, Ross filed a “Motion for Hearing.”

For multiple reasons, Ross’ motion must be denied.

First, Ross is represented by an attorney, and that attorney has not withdrawn.

Thus, while Ross can proceed *pro se*, he should have terminated his relationship with that attorney or had the attorney withdraw from this case.

Second, sentencing in this case occurred via an “I.C.R. 11 Plea Agreement” filed on November 12, 2014. That agreement was signed by Ross and his attorney, as well as the deputy prosecuting attorney. That agreement specified “the determinate portion of the sentences shall be of equal and identical length, specifically forty-eight (48) months.” I.C.R. 11 Plea Agreement, p. 3, ¶ 2. That agreement specified “the indeterminate portion of the sentence in Count I shall be for a term of twelve (12) months.” *Id.*, p. 3, ¶ 3. That agreement specified “the indeterminate portion of the sentence in Counts [sic] II shall be for a term of eighty-four (84) months.” *Id.*, p. 3, ¶ 4. Thus, Ross was sentenced exactly as he bargained.

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.

The Third reason the motion must be denied the sentences were entirely appropriate. Count II carries a mandatory minimum sentence of three years, and Ross, with the advice of counsel, negotiated for a four year fixed sentence. Ross negotiated for a fixed sentence which exceeds the mandatory minimum by only twenty-five percent. 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).

The sentence imposed on January 20, 2015, was and is an appropriate sentence

given Ross's social and criminal history and the crimes for which sentence was imposed. A lesser sentence would depreciate the seriousness of Ross's crimes. This Court concludes that the sentence imposed was and is necessary for the protection of society and the deterrence of Ross and others.

But most importantly, this was the sentence Ross specifically asked for and received via an I.C.R. 11 agreement.

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

NOTICE OF RIGHT TO APPEAL

YOU, ERIC MICHAEL ROSS, 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 4th day of April, 2015.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of April, 2015 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney - Michael G. Palmer
State Appellate Public Defender
Prosecuting Attorney - Tara

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

ERIC MICHAEL ROSS
IDOC # 113901
SICI P. O. Box 8509
Boise, ID 83707

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____, Deputy