

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.)
)
 CHADLEN DEWAYNE SMITH,)
)
)
 Defendant.)
)
 _____)

Case No. **CRF 2009 24152**

**MEMORANDUM DECISION AND
ORDER GRANTING DEFENDANT'S
MOTION TO RECONSIDER, AND
DENYING DEFENDANT'S I.C.R. 35
MOTION**

I. DEFENDANT'S MOTION TO RECONSIDER.

The following is from this Court's Amended Memorandum Decision and Order on *Pro Se* Motions filed on July 20, 2011:

On September 1, 2010, this Court sentenced Chadlen Dewayne Smith (Smith) on the felony crime Injury to Child, I.C. § 18-1508, to a sentence of seven years fixed (determinate) followed by three years indeterminate, for a total unified sentence of ten years. On January 19, 2011, following Smith's unsatisfactory performance on a retained jurisdiction, this Court imposed sentence upon Smith, modifying the sentence to three years fixed followed by seven years indeterminate, and relinquished its jurisdiction. As of that date, Smith was given credit for 355 days of time served on his sentence. Smith will serve the remainder of his three years fixed in prison, following which Smith will be parole eligible during the indeterminate seven years. At all times in these proceedings, Smith was represented by attorney Scott R. Staab.

On July 18, 2011, Smith, *pro se*, filed the following documents with the following captions: 1) Motion for Correction or Reduction of Sentence, ICR 35; 2) Motion and Affidavit in Support for Appointment of

Counsel; Motion and Affidavit for Permission to Proceed on Partial Payment of Court Fees (Prisoner); and 4) Motion for Hearing (on ICR 35 Motion). All these documents are on forms available in prison, and were filled out by Smith. While Smith certifies a copy of these documents was sent by Smith to the Kootenai County Prosecuting Attorney, no copy is shown by Smith being sent to his attorney Scott R. Staab.

The problem with these motions is that Scott R. Staab has not withdrawn from representing Smith. I.C.R. 44.1. Nor has Smith made any request that Staab be discharged from representing Smith. Smith has a right to counsel and he has counsel of record. If Smith wishes to waive that right to counsel and represent himself, he needs to make that clear to this Court. *State v. Peck*, 130 Idaho 711, 946 P.2d 1351 (Ct. App., 1997). Smith has failed to do so.

Accordingly, none of Smith's documents filed with the Court are considered "filed" by this Court. This Court determines there are no issues presently before this Court as a result of these documents. If Smith's counsel of record wishes to file pleadings, or wishes to adopt what Smith has filed, at that time there would be an issue before the Court. If Smith makes clear his desire to waive his right to counsel, then at that time there would be an issue before the Court.

Additionally, Smith requested partial payment of fees for his I.C.R. 35 Motion. The preprinted prison form Smith used is more commonly used for appeals. There is no fee involved in filing an I.C.R. 35 Motion.

However, Smith faces a larger problem than using the wrong form and not having to pay filing fees. Idaho Criminal Rule 35 requires any motion for reduction of sentence to be filed "within 120 days after the court releases retained jurisdiction." I.C.R. 35. This Court relinquished jurisdiction on January 19, 2011. The last day for Smith to file his I.C.R. 35 motion would have been May 19, 2011. Smith filed his I.C.R. 35 Motion *pro se* on July 18, 2011, two months after the last date he could have filed such motion.

IT IS HEREBY ORDERED THAT Smith's *pro se* documents filed July 18, 2011, are of no legal effect and no issue is under advisement based on those filings.

Amended Memorandum Decision and Order on *Pro Se* Motions, pp. 1-3. On July 20, 2011, Staab filed his Notice of Withdrawal as counsel for Smith.

On October 6, 2011, Smith, *pro se*, filed an Affidavit of Chadlen D. Smith. In that Affidavit, Smith correctly points out this Court erred in stating that January 19, 2011, was the date this Court relinquished jurisdiction upon Smith, and the correct date was March 16, 2011. Thus, Smith's I.C.R. 35 Motion is timely. In that Affidavit, Smith writes:

"Wherefore, Defendant respectfully prays that this Honorable Court reconsider it's prior

decision.” Affidavit of Chadlen D. Smith, p. 1.

While the Affidavit is not a “motion”, essentially Smith is requesting reconsideration of this Court’s prior determination. This reconsideration is warranted. Smith’s motion to reconsider must be granted. The appropriate remedy for the granting of Smith’s motion to reconsider is for this Court to consider Smith’s I.C.R. 35 motion, and decide such on the merits.

IT IS THEREFORE ORDERED Smith’s motion to reconsider is **GRANTED**.

II. DEFENDANT’S I.C.R. 35 MOTION.

On, July 18, 2011, Smith filed the instant “Motion for Correction or Reduction of Sentence, I.C.R. 35”, requesting that his sentence be reduced by a year off his fixed sentence and three and a half years reduced from his indeterminate sentence. Smith essentially bases this motion on a claim for leniency. Motion for Correction or Reduction of Sentence, I.C.R. 35, p. 1, 3. The basis for Smith’s motion is his claim that “The information used by Cottonwood in making the recommendation for relinquished jurisdiction was inaccurate. I was participating fully in my pre-treatment programming as well as groups and schooling.” *Id.*, p. 2.

On September 1, 2010, Smith was sentenced as follows:

INJURY TO CHILD (Felony), I.C. 18-1501(1), committed on November 13, 2009 – to the custody of the Idaho State Board of Correction for a fixed term of SEVEN (7) years followed by an indeterminate term of THREE (3) YEARS, for a total unified sentence not to exceed TEN (10) years.

Sentencing Disposition and Notice of Right to Appeal, p. 2. The Court retained jurisdiction for up to one year and recommended Smith participate in the Therapeutic Community program for “a) chemical dependency treatment, b) sex offender treatment and c) cognitive restructuring.” *Id.* The Court also told Smith in Court and interlineated on his order: “You will need a full disclosure polygraph to have probation considered.” *Id.*

The Idaho Department of Corrections chose to place Smith at its facility in Cottonwood, Idaho, for sex offender treatment. Not long into Smith's retained jurisdiction program, due to Smith's inability to follow orders, the Idaho Department of Corrections recommended relinquishment of jurisdiction, and sent Smith back to the Kootenai County jail.

This Court scheduled Smith's first jurisdictional review hearing on January 13, 2011, but that was continued at Smith's counsel's request to January 19, 2011. At the January 18, 2011, hearing, Smith again requested a continuance, and the Court scheduled the hearing for March 16, 2011. On March 16, 2011, this Court held a jurisdictional review hearing. Smith was present and represented by his attorney Scott Staab. Smith did not have a full disclosure polygraph at this hearing.

The Court relinquished jurisdiction but modified Smith's sentence to three years fixed and seven years indeterminate, in order for Smith to have a chance to obtain the much needed sex offender treatment, chemical dependency treatment, and cognitive restructuring. The Court reasoned if Smith were able to obey the Idaho Department of Correction's rules, he would get into this programming and if he did well in that programming, he might be able to convince the State of Idaho Parole Commission to release him some time after three years. The Court made it clear its decision to relinquish jurisdiction was based primarily on Smith's complete failure to abide by the Idaho Department of Corrections' rules while on his retained jurisdiction, and due to the fact that such poor conduct escalated in the few months he was in their custody. The Court made it clear its decision was not due to Smith's failure to obtain a full disclosure polygraph test.

By also filing a "Motion for Hearing" on July 18, 2011, Smith requested a hearing on his I.C.R. 35 Motion.. A motion to modify a sentence "shall be considered and determined by the court without the admission of addition 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).

The sentence imposed on Smith, as subsequently modified by the Court, was and is an appropriate sentence given Smith's social and criminal history and the crime for which sentence was imposed. A lesser sentence would depreciate the seriousness of Smith's crime. This Court concludes that the sentence imposed was and is necessary for the protection of society and the deterrence of Smith and others.

Smith's claims that “The information used by Cottonwood in making the recommendation for relinquished jurisdiction was inaccurate” and “I was participating fully in my pre-treatment programming as well as groups and schooling”, are simply not supported by the record. Even if they were, it would be evidence for the Court to reconsider relinquishment of jurisdiction, not the sentence imposed. Smith has not asked the Court to reconsider its decision to relinquish jurisdiction, he has only asked this court to FURTHER reduce the sentence originally imposed. There is absolutely no way the Court will make any further reduction. The ONLY reason Smith's sentence was reduced at his jurisdictional hearing was to give Smith some incentive to conform his conduct in prison. Should Smith choose to do that, then he should get the extensive programming he needs and he might make parole in a few years. Should Smith not choose to conform his conduct in prison, this Court is confident the State of Idaho Parole Commission will keep Smith incarcerated for the

full ten years, and if Smith is unable to conform his conduct in prison, then society needs to be protected as much as possible from Smith, the entire ten year maximum for the felony crime Injury to Child.

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

NOTICE OF RIGHT TO APPEAL

YOU, Chadlen Dewayne Smith, 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 7th day of November, 2011

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of November, 2011 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Prosecuting Attorney -

Chadlen Dewayne Smith
IDOC No. 97703
ICC R-19-B
P. O. Box 70010
Boise, ID 83707

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____
Deputy