

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 BONNER**

STATE OF IDAHO,)
)
)
Plaintiff,)
)
vs.)
)
MAX DOUGLAS WILLIAMS)
DOB: 01/29/1967)
SSN: ****3050)
IDOC: 105458)
)
Defendant.)

Case No. **BON CRF 2012 398**

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

On October 29, 2012, MAX DOUGLAS WILLIAMS (Williams) was sentenced by the Honorable Steve Verby as follows:

DRIVING UNDER THE INFLUENCE, to the custody of the State of Idaho Board of Correction for a fixed sentence of ONE (1) year followed by an indeterminate sentence of TWO (2) years for a total unified sentence of THREE (3) years.

Judge Verby retained jurisdiction. On February 28, 2013, after receiving programming on the retained jurisdiction, Judge Verby placed Williams on five years supervised probation. On August 6, 2013, Williams was arrested and on August 14, 2013, a Report of Probation Violation was filed. On October 7, 2013, Williams admitted to violating his probation as alleged, and on October 28, 2013, the undersigned District Judge revoked Williams probation, imposed his sentence and Williams was sent on a second "rider" or period of retained jurisdiction, this time the recommendation was for the Therapeutic Community or for a CRP rider (the second option being made due to Williams' violent propensities).

On November 8, 2013, Williams filed a Motion for Reconsideration of Sentence

Pursuant to I.C.R. 35. That motion did not specify any type of relief, no reduction of sentence, nor the basis of any relief. The reason stated in the motion for this ambiguity was Williams was transported to prison prior to being able to meet with his attorney after the October 28, 2013, hearing. Williams then submitted his own handwritten Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, which was attached to an Amended Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, and filed such on November 19, 2013. In the amended motion "...the Defendant respectfully requests that the Court reduce the Defendant's current unified sentence of one (1) year fixed, two (2) years indeterminate, not more than three (3) years, to a fixed term of two (2) years..." Amended Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, pp. 1-2. The handwritten attachment states the relief Williams wishes is "the Court shall reduce the current term from one year fixed plus two years indeterminate, three years unified, to a fixed term of two years." Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, p. 5. Williams next requests: "that the Court shall relinquish jurisdiction forthwith to the Idaho Department of Corrections to commence serving the fixed term." *Id.*

It would appear that Williams is not doing well on the period of his retained jurisdiction, or, simply wishes to give up on the period of retained jurisdiction. In either event, Williams also wishes to have his poor behavior or his laziness rewarded by the Court's reduction of his sentence. For obvious reasons, the Court denies such a request.

Also, no legal basis has been stated for this Court's ability to **increase** the fixed portion of his sentence. Idaho Criminal Rule 35 only discusses reduction of sentences. *State v. Timbana*, 145 Idaho 779, 782, 186 P.3d 635, 638 (2008) at least infers that a Court cannot increase a sentence. In *State v. Johnson*, 101 Idaho 581, 618 P.2d 759 (1980), the Idaho Supreme Court held that where a defendant was sentenced, then fled, then found, the district court could withdraw the prior sentence and impose a new

sentence because the original sentence was not “executed.” 1010 Idaho 581, 585, 618 P.2d 759 , 763. The Idaho Supreme Court held:

Prior to his resentencing on July 11, 1977, Johnson had not been placed in the custody of the Board of Corrections under his original sentence and commitment. Therefore, the district court had jurisdiction to withdraw its sentence and impose a new one since the defendant has not commenced serving the original sentence.

Id. (citations omitted). The following quote from *State v. McGonigal*, 122 Idaho 939, 940, 842 P.2d 275, 276 (1992), convinces this Court that because Williams has now *twice* been placed in the custody of the State of Idaho Board of Correction, this Court lacks jurisdiction to impose a new sentence at this time: “In *State v. Johnson*, the Court held that a trial court has jurisdiction to withdraw its sentence and impose a new one before the defendant has been placed in the custody of the board of correction under the original sentence and commitment.” The Idaho Court of Appeals decision in *State v. Petersen*, 149 Idaho 808, 811-812, 241 P.3d 981, 984-85 (Ct.App. 2010), makes it a little unclear as to commitment and a period of retained jurisdiction.

In none of Williams’ various Rule 35 motions does Williams request a hearing. 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.

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 October 29, 2012, was and is an appropriate sentence

given Williams's social and criminal history and the crime for which sentence was imposed. A lesser sentence would depreciate the seriousness of Williams's crime and would not protect the public. This Court concludes that the sentence imposed was and is necessary for the protection of society and the deterrence of Williams and others.

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

NOTICE OF RIGHT TO APPEAL

YOU, MAX DOUGLAS WILLIAMS, 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 16th day of December, 2013.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of December, 2013 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney - Daniel Taylor
Prosecuting Attorney -

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

**CLERK OF THE DISTRICT COURT
BONNER COUNTY**

BY: _____, Deputy