

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.)
)
DAMON EUGENE JOHNSON)
DOB: 12/26/1976)
SSN:)
IDOC: 107386)
)
Defendant.)

Case No. **BON CRF 2012 5890**

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

On March 25, 2013, Damon Eugene Johnson (Johnson) was sentenced as follows:

COUNT II – AGGRAVATED ASSAULT, (a felony), I.C. § 18-901(b), 18-905(a) committed on December 18, 2012 – to the custody of the Idaho State Board of Correction for a fixed term of FIVE (5) years followed by an indeterminate term of ZERO (0) years, for a total term not to exceed FIVE (5) years.

The Court appreciates this is the maximum allowable sentence for the crime of Aggravated Assault. This Court imposed that sentence but retained jurisdiction for up to one year, and recommended that Johnson take the Correctional Alternative Placement Program, and this Court stated on this Court’s Order:

SPECIFICALLY CRP TO DEAL WITH HIS ANGER./VIOLENCE. ALSO NEEDS CHEMICAL DEPENDENCY TREATMENT. Will Need to pass full disclosure polygraph re: underlying offense before being considered for probation.

Sentencing Disposition, p. 2. (bold and capitalization in original).

On July 12, 2013, Johnson timely filed the instant “Motion for Reconsideration of

Sentence Pursuant to I.C.R. 35”, requesting that “...the Court to reconsider the Judgment and Sentence entered herein March 23, 2013.” Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, p. 1. Johnson bases this motion on “...a plea for leniency.” *Id.* Attached to that I.C.R. 35 Motion is a two page handwritten letter from Johnson dated July 7, 2013. In that letter, Johnson complains that “I reached a plea agreement to 2 fixed, 3 indeterminate.” Johnson ignores the fact that at the time he pled guilty to that crime on March 4, 2013, this Court told Johnson “Do you understand that [Judge Mitchell] is not bound by the plea agreement?”, to which Johnson responded “Yes.” Johnson also ignores the fact that he signed the Guilty Plea form on February 28, 2013, in which he checked “Yes” to the question “Do you understand that the Judge is not required to follow the sentence recommended by either your attorney or the prosecutor?” Guilty Plea, p. 8, Question no. 24. Johnson next complains “As the basis for your judgement [sic] in deciding to impose the maximum sentence, you used my prior criminal record to influence your decision.” The Court has an obligation to consider any defendant’s prior criminal record. I.C.R. 32(b)(2); *State v. Toohill*, 103 Idaho 565, 566-569, 650 P.2d 707, 708-711 (Ct.App. 1982). Johnson next states that he has since agreed to sign over his parental rights to the daughter he and his victim have together. Custody of any child had nothing to do with the original sentencing decision, so a change in that custody has absolutely no relevance to the I.C.R. 35 Motion.

Also faxed by Johnson’s attorney at the same time Johnson’s attorney filed Johnson’s I.C.R. 35 Motion, was a “Statement of Dorothy Doney” (Doney) which is a copy of a document that was apparently filed in Superior Court in Spokane County, Washington, and which is dated August 6, 2012. Dorothy Doney is the victim of Johnson’s crime in the present case. In that affidavit in a different, earlier case, Doney goes on about how she wants the charges and the “no contact order” (in the Washington

case) dismissed. It is unknown what relevance Johnson attaches to this “Statement of Dorothy Doney” made on August 6, 2012, when four months later, on December 18, 2012, these events occurred in the present case: Doney noticed Johnson had a gun and Doney began to drive off, Johnson jumped in the car Doney in which Doney driving and trying to get away from Johnson, and Johnson pushed Doney into the passenger seat. Presentence report, p. 3. Johnson then held the gun to Doney’s side until Doney took the gun from Johnson, after which the vehicle slid off the snow covered road. Johnson threw the gun in the snow. *Id.* At sentencing on March 25, 2013, Doney testified Johnson took her gun without permission, then held it to her and she did not know if she would ever see her kids again. Doney testified that prior to the events in question in this case, in August 2012, Johnson beat her so bad that she needed reconstructive surgery. Doney testified that she has been going to counseling for physical and sexual abuse suffered at the hands of Johnson. Doney testified she was only one of his victims, and that a rider (retained jurisdiction) would not be appropriate. Doney testified she is still fearful of Johnson. Accordingly, a “statement” written by Johnson’s victim in this case, prior to the events in question, and apparently prior to the beating at the hands of Johnson for which Doney required reconstructive surgery, is completely irrelevant.

In his motion, Johnson requested a hearing. Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, p. 1. 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. *Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710. 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 March 25, 2013, was and is an appropriate sentence given Johnson's social and criminal history and the crime(s) for which sentence was imposed. A lesser sentence would depreciate the seriousness of Johnson's crimes. This Court concludes that the sentence imposed was and is necessary for the protection of society and the deterrence of Johnson and others.

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

NOTICE OF RIGHT TO APPEAL

YOU, DAMON EUGENE JOHNSON, 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 23rd day of July, 2013.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

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

Defense Attorney - Linda J. Payne
Prosecuting Attorney -

DAMON EUGENE JOHNSON
IDOC #

Probation & Parole

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

**CLERK OF THE DISTRICT COURT
BONNER COUNTY**

BY: _____, Deputy