

FILED 12/18/18
AT 11:35 O'clock AM
CLERK, DISTRICT COURT
[Signature]
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.)
)
GARY LEE NOBLE)
DOB: 04/12/1969)
SSN: XXX-XX-0320)
IDOC: 130343)
Defendant.)

Case No. **CR28-18-11817**

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

I. PROCEDURAL BACKGROUND.

On November 28, 2018, this Court sentenced Gary Lee Noble (Noble) as follows:

- COUNT I - POSSESSION OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE), (a felony), I. C. 37-2732(c)(1), committed on July 24, 2018 — to the custody of the Idaho State Board of Correction for a fixed term of THREE (3) years followed by an indeterminate term of FOUR (4) years, for a total term not to exceed SEVEN (7) years.
 - COUNT II - POSSESSION OF A CONTROLLED SUBSTANCE (HEROIN), (a felony), I. C. 37-2732(c)(1) committed on July 24, 2018 — to the custody of the Idaho State Board of Correction for a fixed term of THREE (3) years followed by an indeterminate term of FOUR (4) years, for a total term not to exceed SEVEN (7) years.
- THESE SENTENCES RUN CONSECUTIVE.

Sentencing Disposition and Notice of Right to Appeal 1-2. Rather than impose Noble's prison sentences, as the Deputy Prosecuting Attorney recommended and as the Presentence Report recommended (Presentence Report 27), the Court instead retained jurisdiction for a period of one year pursuant to I.C. § 19-2601. *Id.* at 2. At the November 28, 2018, hearing, this Court stated the reason it would retain jurisdiction was to allow Noble to obtain chemical dependency treatment.

On December 13, 2018, Noble, through counsel, filed his "Motion for

Reconsideration of Sentence Pursuant to I.C.R. 35”, requesting that “the Court reconsider the Judgment and Sentence entered herein November 29, 2018. This Motion is made as a plea for leniency.” Mot. for Recons. of Sentence Pursuant to I.C.R. 35, 1. In that motion, Noble requested a hearing. *Id.* 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 and Noble’s entire file including his presentence report. There is nothing that could be presented at a hearing that would benefit the Court. A hearing would only waste counsel and the Court’s time.

II. ANALYSIS.

A. NOBLE HAS NOT SET FORTH A VALID BASIS FOR HIS MOTION, NOR HAS NOBLE 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, Noble has not only not set forth any evidence that could be adduced, Noble has failed to state the basis for the Rule 35 Motion, other than it is “a plea for leniency.” The Court cannot be required to guess at what evidence Noble might present in support of his Rule 35 Motion. Because Noble has failed to set forth any facts or evidence which would support his claim for leniency, his Rule 35 Motion must be denied due to that failure.

B. NOLBE’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 the sentences originally imposed were reasonable. The Court finds the imposition of those sentences on November 28, 2018, was a reasonable decision. Because of Noble’s lengthy criminal history and his history of continued drug use despite being given prior addiction treatment, this Court strongly felt the only way to keep the community safe (short of simply imposing his prison sentence), while having Noble continue to treat his addiction and mental health condition, his nebulously described mental health issues of ADD and bipolar disorder (Presentence Report 22), and his past trauma, was to utilize a period of retained jurisdiction. The length of the two sentences and the consecutive nature of those sentences was explained to Noble at the

time of sentencing. The reasons given by the Court were the extent and duration of Noble's drug use, his past record and the threat he poses to the public. The Court's primary responsibility is to protect the public. *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (1982). At the time of his arrest for these crimes, Noble was using methamphetamine 3-4 times a week, 1-2 grams each occasion, and heroin 1-2 times a week 1/10 gram each occasion. Presentence Report 22. While Noble was working just prior to committing these crimes in Idaho (*Id.* at 21), it is clear from his record how he has supplemented his income to support his drug habit. When he was found in possession of heroin and methamphetamine on July 24, 2018, Noble was being investigated for a fraudulent return of merchandise at Walmart. *Id.* at 4. Noble gave a false name because he knew he had a warrant for his arrest from the State of Washington. *Id.* Noble actually had three warrants for his arrest from the State of Washington at that time. *Id.* at 15-16. Noble's criminal record began thirty years ago in 1988 with a misdemeanor assault as a juvenile, an assault and theft in 1990 as an adult, a misdemeanor drug offense (cocaine) in 1990, a felony forgery in 1990, a probation violation for that crime in 1991, another probation violation in 1992, a felony possession of stolen property in 1995, a DUI in 1998, a felony forgery in 1998, a felony murder in 1998 (which Noble claims was reduced to manslaughter, for which he served eleven years in prison, then violated his parole and served three more years), a felony assault and tampering with a witness in 2009, a felony taking a motor vehicle without permission in 2015 (for which he served two years in prison), and a felony drug charge in 2015. *Id.* at 7-15. Noble has spent significant time incarcerated in jail and in prison. *Id.* Given the fact that Noble has lived predominantly in the state of Washington, and has committed most of his crimes in that state, there are nineteen separate occasions where criminal offense or offenses were charged, but not

prosecuted by the State of Washington. *Id.* This Court concludes that imposition of Noble's sentences and retaining jurisdiction were decisions necessary for the protection of society, the deterrence of Noble and others, and to try to help Noble in his rehabilitation, if that is possible. A period of retained jurisdiction gives this Court the opportunity to evaluate whether or not Noble is an acceptable risk to be treated and to be rehabilitated in the community while on probation following that period of retained jurisdiction. The prison sentences imposed allow this Court to protect the public for an appropriate period of time by incarcerating Noble if he is not able to prove he is an acceptable risk to be treated in the community.

III. ORDER.

IT IS THEREFORE ORDERED that Noble's Motion for Reconsideration of Sentence Pursuant to I.C.R. 35 is **DENIED**.

NOTICE OF RIGHT TO APPEAL

YOU, GARY LEE NOBLE, 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.

DATED this 18th day of December, 2018.


John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 18 day of December, 2018 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney – Lisa Chesebro *pd-lex@icgav.us*
Prosecuting Attorney - *hpcpaicourts@icgav.us*

Idaho Department of Correction
Records Division (certified copy)
Fax: (208) 327-7445 *Centralrecords@idoc.idaho.gov*

GARY LEE NOBLE
IDOC # 130343

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:  Deputy