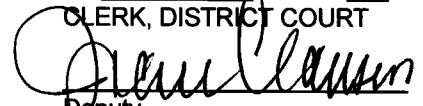


FILED 12/18/18

AT 11:50 o'clock a 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.)
)
BRIAN ERIC HOLLIS)
DOB: 12/05/1964)
SSN: XXX-XX-5370)
IDOC: 76111)
Defendant.)
)
_____)

Case No. **CRF 2017 13474**
CRF 2017 21259
**MEMORANDUM DECISION AND
ORDER DENYING
RECONSIDERATION OF THIS
COURT'S MEMORANDUM DECISION
AND ORDER DENYING I.C.R. 35
MOTION AND NOTICE OF
RIGHT TO APPEAL**

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On November 29, 2018, this Court filed its "Memorandum Decision and Order Denying I.C.R. 35 Motion and Notice of Right to Appeal." On December 7, 2018, counsel for defendant Brian Eric Hollis (Hollis) filed a "Motion to Reconsider", asking this Court to reconsider its November 29, 2018, Order Denying I.C.R. 35 Motion, and asking that the Court vacate that order and permit Hollis a hearing on his I.C.R. 35 Motion. Mot. to Reconsider 2. Also on December 7, 2018, counsel for Hollis filed "Monica G. Rector's Affidavit in Support of Motion to Reconsider", and "Jessica McGovern's Affidavit in Support of Motion to Reconsider."

In its Memorandum Decision and Order Denying I.C.R. 35 Motion and Notice of Right to Appeal, this Court denied Hollis's I.C.R. 35 Motion for two reasons: 1) Hollis's motion was time barred because he unreasonably delayed in bringing it to a hearing, and 2) Hollis has not set forth a valid basis for his motion, nor has Hollis set forth any evidence

to support his motion. The affidavits of Monica G. Rector (Hollis's attorney) and Jessica McGovern (criminal paralegal for Hollis's attorney), as well as the Motion to Reconsider, all are focused on the first reason this Court denied Hollis's I.C.R. 35 Motion, which was Hollis's unreasonable delay in bringing his motion to a hearing.

In its Memorandum Decision and Order Denying I.C.R. 35 Motion and Notice of Right to Appeal, this Court found the hearing scheduled for December 4, 2018, was not reasonably timely, given that more than seven months have passed from the time Hollis's Rule 35 Motions were filed in each case on April 26, 2018, to the time for hearing on December 4, 2018. Mem. Decision and Order Den. I.C.R. 35 Mot. and Notice of Right to Appeal 2-3. The Court found the delay on Hollis's part was unreasonable. *Id.*

On April 18, 2018, this Court sentenced Brian Eric Hollis (Hollis) as follows:

CRF 2017 13474 – COUNT I – LEWD CONDUCT WITH A MINOR UNDER 16, (a felony), I. C. 18-1508, 19-2520G(2), committed on July 17, 2017 – to the custody of the Idaho State Board of Correction for a fixed term of TWENTY-FIVE (25) years followed by an indeterminate term of LIFE years, for a total term not to exceed LIFE years.

CRF 2017 13474 - COUNT II - SEXUAL EXPLOITATION OF A CHILD, (a felony), I. C. 18-1507(2)(b) committed on July 17, 2017 – to the custody of the Idaho State Board of Correction for a fixed term of FIFTEEN (15) years followed by an indeterminate term of ZERO (0) years, for a total term not to exceed FIFTEEN (15) years.

CRF 2017 21259 – COUNT I - SEXUAL EXPLOITATION OF A CHILD, (a felony), I. C. 18-1507(2)(b) committed on July 7, 2017 – to the custody of the Idaho State Board of Correction for a fixed term of FIFTEEN (15) years followed by an indeterminate term of ZERO (0) years, for a total term not to exceed FIFTEEN (15) years.

CRF 2017 21259 – COUNT II - SEXUAL EXPLOITATION OF A CHILD, (a felony), I. C. 18-1507(2)(b) committed on July 7, 2017 – to the custody of the Idaho State Board of Correction for a fixed term of FIFTEEN (15) years followed by an indeterminate term of ZERO (0) years, for a total term not to exceed FIFTEEN (15) years.

CRF 2017 21259 – COUNT III - SEXUAL EXPLOITATION OF A CHILD, (a felony), I. C. 18-1507(2)(b) committed on July 7, 2017 – to the custody of the Idaho State Board of Correction for a fixed term of FIFTEEN (15) years followed by an indeterminate term of ZERO (0) years, for a total term not to exceed FIFTEEN (15) years.

These sentences run CONCURRENT.

Sentencing Disposition and Notice of Right to Appeal, 2. Pursuant to I.C. §19-2502G, the Court on April 18, 2018, found Hollis to be a “repeat sex offender.” On April 26, 2018, counsel for Hollis timely filed a “Motion for Reconsideration of Sentence Pursuant to

I.C.R. 35.” On July 31, 2018, counsel for Hollis filed a Notice of Hearing, scheduling the I.C.R. 35 Motion for hearing on September 20, 2018. Due to a request made by counsel, that hearing did not occur. On September 26, 2018, counsel filed a different Notice of Hearing, scheduling the I.C.R. 35 Motion for hearing on November 1, 2018. On October 1, 2018, counsel filed an Amended Notice of Hearing, scheduling the I.C.R. 35 Motion for hearing on December 4, 2018. At no time did the Court cause any delay.

In Hollis’s Motion to Reconsider, Monica G. Rector’s Affidavit in Support of Motion to Reconsider, and Jessica McGovern’s Affidavit in Support of Motion to Reconsider, all filed on December 7, 2018, Hollis’s attorney set forth reasons for the delay.

As set forth below, this Court denies Hollis’s Motion to Reconsider.

II. ANALYSIS OF HOLLIS’S MOTION TO RECONSIDER.

A. Hollis’s Motion is not Supported by any Criminal Rule.

Hollis’s attorney cites no rule basis for his Motion to Reconsider. This Court specifically finds that there is no Idaho Rule of Criminal Procedure which would allow for such a Motion to Reconsider of a denial of a Motion to Reconsider Pursuant to I.C.R. 35.

First, there is no “Motion to Reconsider” in the Idaho Criminal Rules other than a motion to reconsider pursuant to I.C.R. 35. There is no Idaho Criminal Rule which is a corollary to Idaho Rule of Civil Procedure 59 or 60. Thus, this Court finds there is no legal basis for this Motion to Reconsider.

Second, if this were a Motion to Reconsider under I.C.R. 35, it would be a successive I.C.R. 35 Motion, which is prohibited. *State v. Heyrend*, 129 Idaho 568, 929 P.2d 744 (Ct. App. 1996).

B. Even if this Court Could Properly Consider Hollis’s Motion to Reconsider, there is no Factual Basis to Grant Such Motion.

While counsel for Hollis has given an explanation as to why it took so long for a

hearing to be held on Hollis's I.C.R. 35 Motion, nothing in Hollis's Motion for Reconsideration now before this Court, and nothing in the affidavits that were submitted in support of Hollis's current Motion for Reconsideration, cure the other glaring deficiency in Hollis's I.C.R. 35 Motion, which was Hollis's failure to set forth any evidence to support his I.C.R. 35 Motion. Furthermore, nothing has been added that convinces this Court that a hearing on Hollis's I.C.R. 35 Motion would have been necessary. The following is from this Court's Memorandum Decision and Order Denying I.C.R. 35 Motion and Notice of Right to Appeal, filed November 19, 2018. Nothing has changed with the presentation of Hollis's Motion to Reconsider, Monica G. Rector's Affidavit in Support of Motion to Reconsider, and Jessica McGovern's Affidavit in Support of Motion to Reconsider.

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 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 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, counsel for Hollis has failed to set forth evidence that could be adduced at present. Essentially, Hollis has chosen to file an I.C.R. 35 Motion, but subsequently he also chose to untimely notice it up for hearing, and

even with that unreasonable delay in bringing it to hearing, Hollis has never stated what facts or any evidence he might have to support his motion. There are no facts which support Hollis' I.C.R. 35 Motion.

As mentioned above, Hollis bases his motion on "a plea for leniency." Mot. for Recons. of Sentence Pursuant to I.C.R. 35, 1. 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 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 Hollis's sentences imposed on April 18, 2018, were reasonable. On the date of sentencing, the Court explained to Hollis how difficult it was for the Court to impose anything less than a fixed life sentence given the compulsion Hollis has shown for sexually-deviant actions, and that the only reason the Court was imposing a fixed twenty-five year sentence and indeterminate life instead of a fixed life sentence, was an act of mercy. Hollis, who was already a registered sex offender, was discovered by his wife to have pornographic images of his two-year-old granddaughter on his cell phone. Presentence Report 3. Hollis denied penetrating his granddaughter's vagina with his finger (*Id.*), but the photographs clearly show otherwise and the Court, at sentencing, told Hollis that the Court so found. Previously, on November 10, 2004, Hollis was sentenced to a ten-year prison term for Lewd Conduct with a Minor. The victim in that case was Hollis's daughter. The victim, age thirteen at the time, reported that in 1996, her father pushed her shirt up and started sucking and nibbling on her nipples for a few minutes. *Id.* 8. This, among other reasons, is why the court, at the April 18, 2018, sentencing hearing, found Hollis's sexual behavior to be compulsive--something he could not control. At sentencing, this Court was well aware of the fact that Hollis was 54 years old at that time, and that the twenty-five-year fixed sentence will result in being eligible for parole about 23.7 years from now (given

credit for time served), when Hollis would be about age 88. The Court finds that to be an appropriate age to be considered for release, and the Court finds that to be an appropriate amount of time for his fixed sentences.

The sentences imposed on April 18, 2016, were and are appropriate sentences given Hollis's social history, his deviant sexual criminal history, the facts of his prior sexual crime and the facts of the crimes for which sentences were imposed on April 18, 2018. A lesser sentence would depreciate the seriousness of Hollis's crimes. This Court concludes that the sentence imposed was and is necessary for the protection of society, protection of Hollis's current and past victims, protection of other potential victims and the deterrence of Hollis and others.

Memorandum Decision and Order Denying I.C.R. 35 Motion and Notice of Right to Appeal, 3-6.

III. ORDER.

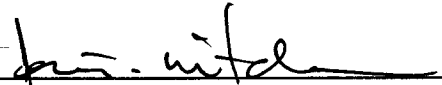
IT IS THEREFORE ORDERED that Hollis's Motion to Reconsider is **DENIED**.

NOTICE OF RIGHT TO APPEAL

YOU, BRIAN ERIC HOLLIS, 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.

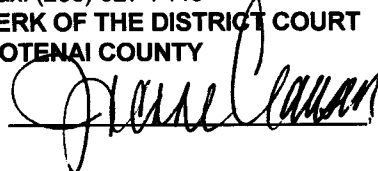


John T. Mitchell, District Judge

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

- ✓ Defense Attorney – Sean Walsh *Jessica Lawton*
- ✓ Prosecuting Attorney – Barry McHugh *V. Paico*
- BRIAN ERIC HOLLIS
- IDOC # 76111

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

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**
BY:  Deputy