



to driving under the influence (second offense) and the State dismissed the charge of driving without privileges.

On August 30, 2022, the trial court sentenced Radan to 365 days in jail, granted him credit for time served of one day and ordered Radan to serve ten days actual jail. The trial court suspended the remainder of Radan's sentence and placed him on a two-year period of supervised probation.

On May 2, 2023, the State filed a Motion to Revoke Radan's Probation based on a probation violation. On May 26, 2023, Radan admitted to the probation violation, and thereafter, the trial court imposed the 336 days remaining in Radan's sentence.

On June 9, 2023, Radan, through his attorney, filed a "Motion for Modification of Sentence Pursuant to I.C.R. 35(b) and Memorandum in Support." On July 11, 2023, the trial Court heard and denied Radan's Rule 35 Motion on the record, and entered its Order Denying Defendant's Rule 35 Motion. On August 22, 2023, exactly 42 days after the Order was issued, Radan timely filed his Notice of Appeal. On September 21, 2023, the transcript from the Rule 35 Motion was filed. On November 27, 2023, Radan filed his Appellant's Brief. On December 8, 2023, the State filed its Appellee's Brief. On December 11, 2023, this Court on appeal entered its Order Directing Appeal Submitted on the Briefs Without Oral Argument, pursuant to I.C.R. 54(f)(1) and I.A.R. 37(a)(2). Any reply brief by Radan was due no later than December 29, 2023. I.C.R. 54(o) and I.A.R. 34(c). No reply brief was filed by Radan by that date.

## **II. STANDARD OF REVIEW**

"When the district court considers an appeal from a magistrate as an appellate proceeding rather than granting a trial de novo, the district judge acts as an appellate court." *State v. Tucker*, 124 Idaho 621, 622, 862 P.2d 313, 314 (Ct. App. 1993). Idaho

Criminal Rule 54(f)(1) states that “the district court must hear appeals from the magistrate court as an appellate proceeding[.]” The rule further states that “[t]he district court must review the case on the record and determine the appeal in the same manner and on the same standards of review as an appeal from the district court to the Supreme Court under the statutes of law of this state, and the Idaho Appellate Rules.” I.C.R. 54(f). When a district court makes an appellate review of a magistrate judge’s decision, the district court “should perform that task in the same manner as [the Supreme Court of Idaho] performs its appellate review of the trial decision of a district court.” *Hawkins v. Hawkins*, 99 Idaho 785, 788-89, 589 P.2d 532, 535-36 (1978).

The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court. *State v. Byrum*, 167 Idaho 735, 743, 476 P.3d 402, 410 (Ct. App. 2020); *Campbell v. Reagan*, 144 Idaho 254, 258, 159 P.3d 891, 895 (2007). A sentence will only be overturned on appeal if it was illegal or an abuse of discretion. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). A sentence within the statutory limits is legal and will usually not be considered an abuse of discretion by the reviewing court. *State v. Chapel*, 107 Idaho 193, 195, 687 P.2d 583, 585 (1984). “Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion.” 134 Idaho at 276, 1 P.3d at 304 (citing *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992)). When determining whether the lower court abused its discretion, the reviewing court must determine whether the lower court: “(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently

with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.” *Lunneborg v. My Fun Life*, 163 Idaho 856, 863-64, 421 P.3d 187, 194-95 (2018).

### III. ANALYSIS

Radan raises only one issue on appeal: “Did the Magistrate abuse its discretion in denying Defendant’s Motion for a reduction of his sentence?” Appellant’s Mem. on Appeal 2. The only basis given by Radan’s attorney for this singular issue on appeal is there is no “clear indication” in the record that “the Magistrate perceived the denial or granting of Radan’s Rule 35 Motion as an issue of ‘discretion.’” *Id.* at 4. Counsel for Radan makes it abundantly clear the only thing Radan feels the magistrate did wrong was to fail to utter the phrase, “I realize this is a matter committed to my discretion”, as counsel for Radan argues: “However, in no instance did the Magistrate identify that his decision was one of ‘discretion.’” *Id.*

#### **A. This Court Decides Radan’s Appeal on the Briefing.**

An appeal from the magistrate court to the district court is governed by Idaho Criminal Rule 54. In relevant part, the rule provides that:

#### **(f) Manner of Review by District Court.**

(1) *Appellate Review with Transcript.* Unless otherwise ordered by the district court, the district court must hear appeals from the magistrate court as an appellate proceeding and a transcript must be prepared as provided in Rule 54(g). The district court must review the case on the record and determine the appeal in the same manner and on the same standards of review as an appeal from the district court to the Supreme Court under the statutes and law of this state, and the Idaho Appellate Rules.

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**(p) Appellate Argument.** Appellate argument may be heard by the district court after notice to the parties in the same manner as notice of hearing of a motion before a trial court under these rules.

I.C.R. 54(f), (p). Arguably, I.C.R. 54(p) gives this court the discretion whether to have oral argument on appeal. This Court finds that I.C.R. 54(f), and Idaho Appellate Rule 37(a) and 109 explicitly gives this Court that discretion. On December 11, 2023, this Court gave the parties in this case notice that this appeal would be decided on the briefing submitted. Order Directing Appeal Submitted on the Briefs without Oral Argument, 1.

The sole issue Radan argues on appeal is whether the magistrate court abused its discretion by not putting on record “a clear indication” that the magistrate court had “perceived the denial or granting of Radan’s Rule 35 Motion as an issue of ‘discretion.’ ” (Appellant’s Mem. on Appeal 4). The transcript of Radan’s Rule 35 Motion is included within the court record on appeal, and the issue on appeal is one that can be determined based upon this transcript. This Court does not find that a hearing or oral argument is necessary. In making that finding, this Court perceives the issue of whether to have a hearing is one of discretion committed to this Court on appeal, this Court acts within the outer boundaries of that discretion, acts consistently with the legal standards applicable to the specific choices available to it, and reaches its decision by the exercise of reason. *Lunneborg*, 163 Idaho at 863-64, 421 P.3d at 194-95.

**B. The Trial Court Did Not Abuse It’s Discretion Because There Was a Clear Indication on the Record It Perceived The Issue as One of Discretion.**

It should be first noted that in his Appellant’s Brief, Radan’s counsel cites to outdated case law related to appropriate abuse of discretion standard. (See Appellant’s Br. 3, citing to the three-factor test alleged in *State v. Moore* that has since been superseded by *Lunneborg*). As this Court was the trial court in the *Lunneborg* case, this

Court is more than aware of the correct standard for abuse of discretion is now a four-factor test: “Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.” *Lunneborg v. My Fun Life*, 163 Idaho at 863-64, 421 P.3d at 194-95.

The Appellant’s Brief focuses on the assertion that “in no instance did the Magistrate identify that his decision was one of ‘discretion’.” Appellant’s Br. 4. (citing in general to the transcript). Radan’s attorney alleges that, “Absent clear indication in the record below the Magistrate perceived the denial or granting of Radan’s Rule 35 Motion as an issue of ‘discretion’, the Order denying Radan’s Motion should be set aside and this matter remanded for further proceedings.” *Id.* **Radan’s attorney cites to no authority to support this assertion.** Accordingly, were this a civil case, Radan’s attorney would be subject to paying the defendant/respondent’s attorney fees on appeal, as Radan’s claims on appeal are **frivolous** (I.R.C.P. 11(b)(2) and are not warranted by existing law or a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. *Id.* Perhaps the reason Radan’s attorney did not cite to any legal authority in support of Radan’s singular argument on appeal, is because there is no law to support such a ridiculous claim. The case law surrounding this issue is clear: **A court is not required to explicitly make a finding regarding its discretion if the record clearly shows that the court correctly perceived the issue as one of discretion.** The direct quote from *State v. Le Veque*, 164 Idaho 110, 114, 426 P.3d 461, 465 (2018), in a criminal case is “A court is not

required to explicitly make a finding regarding its discretion if the record clearly shows that the court correctly perceived the issue.” The direct quote in *Lunneborg* 163 Idaho at 867, 421 P.3d at 198, citing to *State v. Dunlap*, 155 Idaho 345, 363–64, 313 P.3d 1, 19–20 (2013), another criminal case, is: “While the trial court did not expressly cite to the discretionary standard . . . , a court is not required to state such standard expressly if the record clearly shows that the court correctly perceived the issue.”<sup>1</sup> And while the Idaho Rules of Civil Procedure do not apply, the Idaho Rules of Professional Conduct do apply to Radan’s attorney. Radan’s attorney has a mandatory duty to provide “competent representation” to a client (I.R.P.C. 1.1), and this Court finds Radan’s attorney has fallen short in this appeal. Radan’s attorney has a mandatory duty to not defend a proceeding unless there is a basis in law and fact for doing so that is not frivolous (I.R.P.C. 3.1), and this Court finds Radan’s attorney has fallen short of this duty in this appeal. Radan’s attorney has a mandatory duty to disclose to this Court legal authority known to the attorney to be directly adverse to the position of the client on appeal (I.R.P.C. 3.3), and this Court finds Radan’s attorney has fallen short of this duty on appeal. *Lunneborg* is one of the most frequently cited cases found within other cases decided on appeal by both the Idaho Supreme Court and the Idaho Court of Appeals, precisely for the fact that a trial court need not state that the trial court perceives the matter to be committed to its discretion. In other words, Radan’s attorney cannot not know of *Lunneborg*’s holding on the very singular issue upon which Radan bases his appeal.

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<sup>1</sup> See also *IDHW v. Jane Doe (2023-21)*, No. 50818, 2023 WL 7039196, at \*3 (Idaho Ct. App. Oct. 26, 2023): “Determining whether the court perceives an issue of discretion can be established in two ways, by explicit statements of the court or by implication based on the record.”

In this case, it is clear from the record that the trial court perceived the matter of granting or denying Radan's Motion as one of discretion. At the hearing, the trial court took into consideration and discussed in detail the "prior record, the performance on probation, and kind of the other alternatives that have been pointed out here today as to whether leniency would be granted." (Tr. 41, Ln. 1-4). The Court considered the type of crime committed; the history of the case; the aggressive circumstances surrounding this crime; the compliance with the trial court's previous Orders, including the need of a warrant to be issued in the matter; Radan's abeyance between Idaho and Montana causing a month long absence from probation and paroles' supervision; Radan's prior criminal history; the amount of support existing for Radan; and Radan's improvement already seen in the jail, along with Radan's current self-awareness on ways that he could further improve. *Id.* at 35-44. After discussing all of these factors, the trial court concluded:

But ultimately the serious risk, given the DUI charge here and the DUI record, the displayed conduct of really not truly following through with probation between not showing up for jail and then not being back in touch with your probation officer, presents those very concerns as to why you were on supervised probation. That is, the attempt was made to give you a lower amount of jail upfront, but the focus on the supervised probation, unfortunately, really, your actions display that probation and strict compliance with probation was not going to be the priority. So ultimately my determination is that not only was the sentence appropriate when it was imposed, that it still does remain appropriate today.

Tr. 43, Ln. 6-20.

Thus, the defendant's argument that the Court abused its discretion only because it did not expressly state it perceived the matter as one of discretion is unavailing. It is clear from the record that the trial court perceived the matter of granting or denying the Rule 35 Motion as a matter of discretion. It is also clear from the record

(as argued by the State), that Judge Stow correctly perceived the issue as one of discretion, that Judge Stow acted within the outer bounds of his discretion, that Judge Stow acted consistently with the applicable legal standards, and that Judge Stow reached his decision by an exercise of reason. Appellee's Br. 5-7. With such, the trial court did not abuse its discretion in denying Radan's Rule 35 Motion.

**C. The Court Does Not Consider Any Other Arguments on Appeal Not Raised by the Defendant in His Opening Brief.**

An appellate court will not consider an issue not "supported by argument and authority in the opening brief." *State v. Tower*, 170 Idaho 272, 276–77, 510 P.3d 625, 629–30 (2022), *reh'g denied* (June 13, 2022) (quoting *Bach v. Bagley*, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010)). "[A] party waives an issue cited on appeal if either authority or argument is lacking ...." *Id.* (quoting *State v. Wood*, 132 Idaho 88, 94, 967 P.2d 702, 708 (1998)). In this matter, the only issue raised and supported in the Appellant's appeal brief is if the trial court abused its discretion in denying defendant's Rule 35 Motion because it did not perceive the issue as one of discretion. The state argues that, "The defendant's sentence was not illegal." Appellee's Brief 4. However, Radan has not appealed contending the sentence was illegal. Thus, this Court will not address the additional argument raised or argued by the State (that the sentence was not illegal), as it was not raised by Radan in his Notice of Appeal or in his opening brief. The Court certainly notes that Judge Stow's sentence was within the statutory maximum for this crime.

**IV. CONCLUSION AND ORDER.**

For the foregoing reasons, the trial court's denial of Radan's I.C.R. 35 Motion for Reconsideration is affirmed in all aspects.

IT IS HEREBY ORDERED the decision of Judge Stow denying Radan's I.C.R. 35 Motion is AFFIRMED in all aspects.

IT IS FURTHER ORDERED oral argument set for January 30, 2024, is VACATED.

Entered this 10<sup>th</sup> day of January, 2024.

  
John T. Mitchell, District Judge

**Certificate of Service**

I certify that on the 10<sup>th</sup> day of January, 2024, a true copy of the foregoing was mailed postage prepaid or was sent by email, interoffice mail or facsimile to each of the following:

- Hon. James Stow, Magistrate Judge I.O.
- Deputy Public Defender Daniel Cooper *pd.fax@kegov.us*
- Kootenai County Deputy Prosecuting Attorney Joshua Hanners *hpa@countys@kegov.us*

  
Jeanne Clausen, Deputy Clerk