

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED 7-22-05

AT 4:44 O'clock PM
CLERK, DISTRICT COURT

Melvin Thorne
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,)	Case No. CRF 2002 742
vs.)	
)	ORDER DENYING I.C.R. 35
MELVIN COWPERTHWAITE)	MOTION AND NOTICE OF
)	RIGHT TO APPEAL
)	(Leniency)
)	
)	
Defendant.)	

On September 18, 2002, Cowperthwaite, was sentenced to a year and a half fixed and a year and a half indeterminate (total unified sentence of three years) for the crime of Possession of a Controlled Substance (Methamphetamine). He violated his probation and on February 27, 2003 was sent on a retained jurisdiction program. He completed A New Direction addiction treatment program at Cottonwood, and on September 4, 2003 was placed back on probation. He violated his probation again, and on May 11, 2005, admitted his violation of his probation. Disposition was continued, and he was released on his own recognizance with specific conditions, specifically, he had to find a job by May 17, 2005 and had to identify a substance abuse treatment provider and method of payment by the same date. The disposition hearing was held June 16, 2005. At that hearing, Cowperthwaite's sentence was imposed, he was remanded to the custody of the State of Idaho Board of Corrections, given credit for 247 days time served, and given a recommendation for the Therapeutic Community (addiction treatment program).

On June 30, 2005, Cowperthwaite filed the instant I.C.R. 35 Motion requesting that the court modify the sentence or revocation of probation. Cowperthwaite bases this motion on the ground of "undue hardship." Rule 35 Motion, p. 2. This Court treats such as a plea for leniency.

A motion to reduce sentence is a motion for leniency. *State v. Strand*, 137 Idaho 457, 50 P.3d 472 (2002). The decision to grant or deny leniency is left to the sound discretion of the court. *Id.*

A motion to reduce an otherwise lawful sentence is addressed to the sound discretion of the sentencing court. ... Such a motion is essentially a plea for leniency, which may be granted if the sentence originally imposed was unduly severe....

* * *

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. (Citations omitted) *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63 (Ct. App. 1987).

See also *State v. Adams*, 137 Idaho 275, 47 P.3d 778 (Ct.App. 2002).

Even though a hearing was requested, the 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, 887 P.2d 67 (Ct.App. 1994). 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.

Cowperthwaite's motion is not supported by any affidavit by Cowperthwaite. The motion is supported by offers of proof which seem to come from family members. The motion raises several grounds which will be discussed as follows.

First, Cowperthwaite (or his relatives) claim that chief deputy public defender Lynn Nelson was the attorney when Cowperthwaite admitted his violation on May 11, 2005, but

at disposition he was represented by another public defender (Val Siegel) who "did not ever introduce himself to the family of the Defendant who were present or converse with them about an available evidence in mitigation." Rule 35 Motion, pp. 5-6. There is nothing the family could have done to explain, justify or mitigate Cowperthwaite's failure to comply with probation terms to which Cowperthwaite admitted.

Second, Cowperthwaite (or his relatives) claim he has "extensive family support". Rule 35 Motion, p. 6. Where was the family support when he was violating his probation terms and absconding from probation from November 2004 until he was apprehended on this Court's bench warrant on April 23, 2005? Family support, or lack thereof, had nothing to do with this Court's decision to impose sentence.

Third, Cowperthwaite (or his relatives) claim "Defendant had recently been in faith-based counseling and that counseling was proving to be very effective for him." *Id.* This ignores the fact that the Court ordered him to get a substance abuse treatment provider identified by May 17, 2005, not a counselor.

Fourth, Cowperthwaite (or his relatives) claim: "It was not brought out that Defendant was doing so well in his community service that the Coeur d'Alene City Animal Control actually hired him as an employee." This claim is simply FALSE. Defendant himself testified at the June 16, 2005 disposition hearing, and testified on direct examination that he was hired by the animal shelter on June 3, 2005. Cowperthwaite (or his relatives) ignore the fact that this Court continued disposition, granted Cowperthwaite an own recognizance release so that he could find work, but placed a requirement that he find work by May 17, 2005. Cowperthwaite admitted he missed that deadline by more than two weeks, and had a duty to turn himself in as a result of that failure. May 11, 2005 minutes. Yet another failure of Cowperthwaite.

The fifth and final argument is that "According to those (relatives) present at the

hearing, it appears this court put great weight in the fact that the Defendant did not make application to the new Mental Health Drug Court.” Rule 35 Motion, p. 7. The Court specifically made the comment to Cowperthwaite at the June 16, 2005 disposition hearing, that “You do not sound sure yourself about your need for mental health treatment”, noting that he had still not obtained the medication prescribed by Dr. Stengel, the psychiatrist the Court required Cowperthwaite to see. The Court noted that Cowperthwaite’s primary problem was his addiction and that he was “manipulative.” The presentence report, authored on July 2, 2002, recommended: “The defendant should be required to obtain and follow through with all recommendations contained in a psychological evaluation.” Presentence Report, p. 10. This Court on September 19, 2002, TWO YEARS BEFORE MENTAL HEALTH DRUG COURT WAS EVEN STARTED, required Cowperthwaite to obtain a psychological evaluation by no later than October 31, 2002, as part of the terms and conditions of his probation. A term and condition he ignored (term and condition No. 28), for which he was violated in the November 14, 2002 Report of Violation. After his retained jurisdiction hearing, he was again placed on probation on September 4, 2003, and was again required to get a psychological evaluation, this time by October 31, 2003 (term and condition No. 23). Cowperthwaite again ignored that probation term. It was the Court who finally made him go to a psychological evaluation and paid for that evaluation, after he had been apprehended on the Court’s bench warrant. Order, filed May 18, 2005. There is more than sufficient evidence to indicate that Cowperthwaite did not feel he had a mental illness which needed treatment, even up to the June 16, 2005 disposition hearing. The Court viewed Mr. Cowperthwaite’s problem as primarily attitude based and addiction based, not due to his mental illness. It was for that reason that the Court imposed sentence and recommended the Therapeutic Community. The Court based its decision

that Cowperthwaite's problems were attitude and addiction related, because even though the Court administered psychological evaluation indicated bi-polar disorder, Cowperthwaite was able to function well when he wanted to (he was usually employed, and he was able to comprehend the prison based treatment program A New Direction and do well in that program). The Court was confident that Department of Corrections would give Cowperthwaite the psychotropic medications, based on recent assurances from David Haas, Medical Services Manager for the Department of Corrections. The Court was confident that if Cowperthwaite wanted those medications, he would perform even better in the Therapeutic Community than he did in A New Direction, and left the encouragement to the State of Idaho Board of Pardons and Parole that they should consider Mental Health Drug Court as an adjunct to Cowperthwaite's parole, **after** he completes the Therapeutic Community. Cowperthwaite simply must address his addiction, and it is this Court's opinion that his mental illness is not playing the major part in his failure to do so. Even if his mental illness were playing a major part in Cowperthwaite's failures, that fact is a moot point as Cowperthwaite has shown no inclination to believe he has a bi-polar condition, and he has shown little interest in treating such as a priority. Cowperthwaite's attitude is what has caused him problems. Nothing is better suited to deal with Cowperthwaite's addiction and attitude than the Therapeutic Community.

The sentence imposed on September 18, 2002, was and is an appropriate sentence given Cowperthwaite's social and criminal history and the crime(s) for which sentence was imposed. A lesser sentence would depreciate the seriousness of Cowperthwaite's crimes. I conclude that the sentence imposed was and is necessary for the protection of society and the deterrence of Cowperthwaite and others.

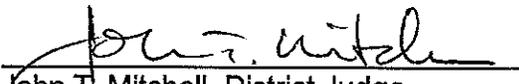
IT IS THEREFORE ORDERED that Cowperthwaite's I.C.R. 35 Motion is **DENIED**.

NOTICE OF RIGHT TO APPEAL

YOU, Melvin Cowperthwaite, 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 22nd day of July, 2005.


John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 22 day of July, 2005 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

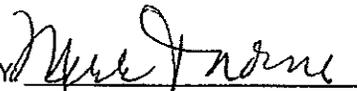
Defense Attorney - Lynn Nelson/Val Siegel/Clark
Peterson
Prosecuting Attorney -

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

MELVIN COWPERTHWAITE
IDOC # 64302

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

Probation & Parole

BY  Deputy