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County of KOOTENAI) ss
FILED 5/23/07
AT 4:00 o'clock P 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.

ALVIN BRUCE ERICKSON

Defendant.

Case No. **CRF 2002 22195**
CRF 2004 8776

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

I. PROCEDURAL HISTORY.

On July 24, 2003, Erickson, was sentenced as follows in Kootenai County Case No. CRF 2002 22195:

> CRF 2002 22195 - Injury to Children, (a felony), Idaho Code § 18-1501(1), committed on or between May 1, 2001 and December 31, 2001 – to the custody of the Idaho State Board of Correction for a fixed term of TWO (2) years followed by an indeterminate term of FOUR (4) years, for a total term not to exceed SIX (6) years.

That sentence was suspended and he was placed on probation. On April 26, 2004, and May 5, 2005, Reports of Probation Violation were filed. Erickson admitted these allegations. A new charge of possession of a controlled substance, methamphetamine, was filed in CRF 2004 8776, to which Erickson pled guilty. On June 1, 2004, Erickson was sentenced as follows on that new charge and committed to the custody of the Idaho State Board of Correction:

> CRF 2004 8776 - Possession of a Controlled Substance, Idaho Code § 37-2732(c)(1), committed on April 26, 2004 – to the custody of the Idaho State

Board of Correction for a fixed term of TWO (2) years followed by an indeterminate term of FOUR (4) years, for a total term not to exceed SIX (6) years. This sentence runs CONCURRENT with the sentence imposed in CRF 2002 22195.

Sentence was imposed on the earlier case, CRF 2002 22195. In both cases, Erickson was sent to prison on the retained jurisdiction program. Erickson completed that retained jurisdiction program with a recommendation from the State of Idaho Board of Correction that the Court relinquish jurisdiction and that he not be placed on probation. On September 29, 2004, this Court imposed a second period of retained jurisdiction upon Erickson. Following completion of that second retained jurisdiction, Erickson received a recommendation from the State of Idaho Department of Correction to be placed on probation. On February 15, 2005, Erickson was placed on probation. On September 30, 2005, a Report of Probation Violation was filed. Erickson admitted his probation violations on October 31, 2005, and on December 29, 2005, Erickson's probation was revoked and his two prison sentences were imposed.

On September 7, 2006, Erickson filed a post conviction relief case, Kootenai Case No. CV 2006 6422. Following a hearing in that case held April 18, 2007, this Court determined Erickson had received ineffective assistance from his trial counsel, Ed Lawlor, as Lawlor did nothing in response to Erickson's requests to file an appeal and to file a Rule 35 Motion on his behalf. This Court found the appropriate relief in Erickson's post-conviction relief case was to vacate his sentences imposed on December 29, 2005, in these two criminal cases, and re-impose those sentences. That was accomplished on April 24, 2007. That allowed Erickson to timely file his appeal and his Rule 35 motion in CRF 2002 22195 and CRF 2004 8776.

On May 2, 2007, Erickson timely filed the instant I.C.R. 35 Motion requesting this Court reconsider its Judgment entered April 24, 2007, by reducing the term of the

sentence due to lack of proper health care for Erickson's heart problems, diabetes, and blood pressure, and due to the department's treatment of Erickson as a sex offender which inhibits his chances of being granted parole. Motion to Modify Sentence Pursuant to Rule 35, pp. 1-2. Erickson bases this motion on no new information other than what he presented at the May 21, 2007, hearing. The testimony of Erickson was that he has had chest pain, was given nitroglycerin, that he was going to get a CT scan but the Department of Correction cancelled that without telling him why, that he had diabetes for two years and the Department of Corrections failed to tell him about that condition, that this Court wanted him to do the Therapeutic Community but the Department of Corrections will not give him that program because he "doesn't have enough points" (presumably his LSI score is not that high), and that the Department of Corrections wants him to take the sex offender program or he will not get parole. Erickson introduced exhibits evidencing his completion of an anger management program and program entitled "God or Drugs", as well as documents showing he was in "minimum custody". Oral argument was held on the Rule 35 Motion on May 21, 2007. Neither party submitted any briefing. The matter is now at issue.

II. ANALYSIS.

A. Applicable Law.

At oral argument the State cited several cases to the Court for the proposition that institutional performance and institutional conditions are not relevant in an I.C.R. 35 Motion: *State v. Roach,* 112 Idaho 173, 730 P.2d 1093 (Ct.App. 1986), *State v. Snapp,* 113 Idaho 350, 743 P.2d 1003 (Ct.App. 1987), *State v. Vega,* 113 Idaho 756, 747 P.2d 778 (Ct.App. 1987) and *State v. Stringer,* 126 Idaho 867, 893 P.2d 814 (Ct.App. 1995). The Court has reviewed each of these cases. The State's continuing objection to the

evidence regarding **institutional performance** presented by Erickson is overruled.

Snapp holds just the opposite of what counsel for the State claimed regarding **institutional performance.** The Idaho Court of Appeals in *Snapp* wrote: "The judge may consider facts presented at the original sentencing **as well as any other information concerning the defendant's rehabilitative progress in confinement.**" 113 Idaho at 351, 743 P.2d at 1004, *citing State v. Torres,* 107 Idaho 895, 693 P.2d 1097 (Ct.App. 1984). (emphasis added). *Stringer* likewise holds just the opposite of what the State claims, and that the defendant may present "additional information with his motion for reduction." 126 Idaho at 870, 893 P.2d at 817, *citing State v. Hernandez,* 121 Idaho 114, 117, 822 P.2d 1011, 1014 (Ct.App. 1991).

Erickson argues that his performance in prison should be considered. The Idaho Court of Appeals has held that although good conduct while in prison is worthy of consideration, it may not necessarily result in a reduction of a prisoner's sentence. *State v. Gain,* 140 Idaho 170, 176, 90 P.3d 920, 926 (2004), *citing Hassett v. State,* 127 Idaho 313, 317, 900 P.2d 221, 225 (Ct.App. 1995); *State v. Sanchez,* 117 Idaho 51, 52, 785 P.2d 176, 177 (Ct.App. 1990). The evidence concerning a defendant's good conduct while incarcerated must be viewed in light of the entire record and may not be an accurate indicator of future conduct in a non-custodial setting. *Id., citing Sanchez,* 117 Idaho at 52, 785 P.2d at 177. "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, 64 (Ct. App. 1987).

The State's continuing objection to the evidence regarding the **institutional conditions** presented by Erickson is also overruled, although this is a closer call. *Roach*

does not hold that testimony regarding institutional conditions is not relevant in a Rule 35 Motion. *Roach* simply holds that since there is no right to a hearing in a Rule 35 Motion, "it [a Rule 35 Motion] is a poor vehicle for such an attack." 112 Idaho at 175, 730 P.2d at 1095. *Roach* holds that testimony regarding an "attack on the conditions of his confinement", "can be developed more properly either through a writ of habeas corpus...or through the Uniform Post-Conviction Procedure Act..." *Id.* *Vega* is similar to *Roach*, holding that "a Rule 35 motion is an inappropriate proceeding to attack the Board [of Correction's] interpretation" of the law. 113 Idaho at 758, 747 P.2d at 780.

Finally, at oral argument counsel for the State argued that *State v. Tranmer,* 135 Idaho 614, 21 P.3d 936 (Ct.App. 2001), *State v. Maggard,* 126 Idaho 477, 886 P.2d 782 (Ct.App. 1994), and *State v. Payan,* 132 Idaho 614, 977 P.2d 228 (Ct.App. 1998) all stand for the proposition that Erickson has waited too long to bring his Rule 35 motion. The *Tranmer* decision held "any delay which allows the trial court to infringe upon the duties of the parole board is per se unreasonable", and "A clear indication of infringement occurs when a district court reduces a sentence while the defendant is serving the indeterminate portion of his sentence." 135 Idaho at 617, 21 P.3d at 939. Erickson's motion is timely given the re-imposition of sentence following the successful post-conviction relief petition. This Court finds that it has jurisdiction to hear Erickson's Rule 35 Motion. *Payan* 132 Idaho at 619, 977 P.2d at 233. To the extent Erickson invites this Court to "infringe on the duties of the parole board", this Court's decision does not do so.

B. Erickson's Claims of Institutional Conditions.

The testimony of Erickson was that he has had chest pain, was given nitroglycerin, that he was going to get a CT scan but the Department of Correction cancelled that without telling him why, and that he had diabetes for two years and the Department of

Corrections failed to tell him about that condition. This Court agrees that due to an evidentiary hearing, these claims are better addressed in a post-conviction petition or a habeas corpus proceeding. However, an evidentiary hearing was held in Erickson's Rule 35 Motion. The Court allowed Erickson to present all the evidence he wished to present. This evidence amounted to generalized complaints by Erickson. There was no evidence that his care for either his heart problem or his diabetes was sub-standard. Erickson's complaints boil down to a lack of communication, that the physicians under contract with the Idaho Department of Correction did not communicate his diabetes to him sooner or explain to him why there would be no CT scan for his heart symptoms.

Erickson complained that this Court wanted him to do the Therapeutic Community but the Department of Corrections will not give him that program because he "doesn't have enough points". Although Erickson did not so testify, it is presumed he means his LSI score is not high enough to get him into the Therapeutic Community program. This Court did include the following language in its December 29, 2005, Judgment and Sentence, and reiterated that language when this Court re-imposed sentence on April 24, 2007:

> **IT IS STRONGLY RECOMMENDED THAT YOU PARTICIPATE IN THE "Therapeutic Community" PROGRAM TO ADDRESS YOUR ADDICTION TO ANY CONTROLLED SUBSTANCES AND ALCOHOL, AND THAT YOU TAKE WHATEVER COGNITIVE RESTRUCTURING PROGRAMS AND ANGER MANAGEMENT PROGRAMS ARE AVAILABLE.**
> **The recommendation for the Therapeutic Community is made not only due [sic] the addiction issues, but due to Alvin Bruce Erickson's REPEATED disregard of the prohibition about being around children and associating with women who have minor children.**
> **THE STATE OF IDAHO BOARD OF PARDONS AND PAROLE IS STRONGLY ENCOURAGED NOT TO CONSIDER YOU ELIGIBLE FOR PAROLE UNTIL HE HAS SUCCESSFULLY COMPLETED THE "THERAPEUTIC COMMUNITY" PROGRAM.**

(emphasis in originals). The reasons for this Court's request for the Therapeutic

Community could not be any clearer. However, the last paragraph where the State of Idaho Commission of Pardons and Parole is encouraged not to consider Erickson eligible for parole until he has successfully completed the Therapeutic Community program is not a hallmark of clarity. That paragraph is included to provide Erickson incentive to request the Therapeutic Community while in prison, and to act as a deterrent to Erickson to simply go to prison, never ask for the Therapeutic Community, and plan on getting out on parole at the end of the fixed portion of his sentences without ever taking the Therapeutic Community. That admonition to the Parole Commission is NOT meant to otherwise keep Erickson in prison, due to the fact that he did not get the Therapeutic Community, when the inability to get into the Therapeutic Community is no fault of Erickson's. This Court still feels strongly that Erickson should do the Therapeutic Community, given the extent that methamphetamine use was involved in both crimes. The Pre-Sentence Investigation in CRF 2002-22195 is very illustrative of that fact. However, the State of Idaho Department of Corrections is the entity that determines whether he gets into the Therapeutic Community. To that extent, a copy of this decision is being sent to the State of Idaho Commission of Pardons and Parole.

Finally, Erickson complains that the Department of Corrections wants him to take the sex offender program or he will not get parole. Erickson presented Exhibit D, the "C-Notes" from the State of Idaho Department of Correction. Exhibit D shows the Department of Correction, through its RDU, recommends "sex offender treatment." This fact is certainly no reason for a reduction in sentence in this Court's opinion. The text of the charge "Injury to Children" in the Amended Information in CRF 2002 22195, to which Erickson pled guilty on March 19, 2003, reads:

> That the defendant, ALVIN BRUCE ERICKSON, on or between May 1, 2001, and December 31, 2001, did under circumstances likely to produce great bodily harm or death, commit an injury upon a child under eighteen

> years of age, to-wit: D.J.W., R.M.W. and/or N.E.W. of the ages of ten-14 (10-14), by unlawfully inflicting upon the children unjustifiable physical pain or mental suffering, to wit: engaging in oral and anal sex with another adult in the presence of the children and subjecting them to videos of pornographic material and/or by willfully causing or permitting the children to be placed in a situation endangering their health or person by exposing them to methamphetamine, loaded firearms and/or pointing a firearm at N.E.W., all of which is contrary to the form, force and effect of the statute in such case made and provided and against the peace and dignity of the People of the State of Idaho.

The Pre-Sentence Investigation will not be quoted. I.C.R. 32(h). However, Erickson, the State, and the Department of Correction, who have copy of such, are encouraged to read page two of the Pre-Sentence Investigations in CRF 2002 22195, the seventh and eighth sentence in paragraph two. In summary, the children victims, while camping with their mother, witnessed another male perform fellatio on Erickson while Erickson took pictures of such. When Erickson realized the children were witnessing this, he told the children: "we're having fun. If you don't like it, go somewhere else." At sentencing, Erickson simply said "this was not an intentional situation." This Court certainly understands the State of Idaho Department of Correction wanting Erickson to take the sex offender program. That is a matter between Erickson and the Department of Correction. In any event, such a request by the Department of Correction is certainly not grounds for this Court to exercise its discretion and grant a reduction in sentence pursuant to Rule 35.

C. Erickson's Claims of Institutional Performance.

Erickson presented evidence that he has performed well in prison. That evidence is uncontradicted. The sentences imposed upon Erickson are lawful sentences (they were within the maximum range) and they were not excessive when imposed. Erickson does not argue otherwise.

> 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).

The sentences imposed upon Erickson were and are appropriate sentences given Erickson's social and criminal history and the crimes for which sentence was imposed. A lesser sentence would depreciate the seriousness of Erickson's crimes. I conclude that the sentence imposed was and is necessary for the protection of society and the deterrence of Erickson and others.

III. ORDER.

IT IS HERBY ORDERED that Erickson's I.C.R. 35 Motion is **DENIED.**

NOTICE OF RIGHT TO APPEAL

YOU, Erickson, 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 May, 2007.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 24 day of May, 2007 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney – Robert Romero 664-2193
Prosecuting Attorney – Marty Raap 446-1833
ALVIN BRUCE ERICKSON, IDOC # 69804

Probation & Parole 769-1481

Olivia Craven, Director, State of Idaho Commission of Pardons and Parole (208) 334-3501

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

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY
BY: _____ Deputy

FIRST JUDICIAL DISTRICT KOOTENAI COUNTY STATE OF IDAHO CLERK OF COURT