

STATE OF IDAHO )  
County of KOOTENAI ) ss

FILED 7-5-06

AT 10:01 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. )

DAVID DARWIN DONK )

Defendant. )

Case No. **CRF 2005 17485**  
**CRF 2005 17633**

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

On March 9, 2006, following a guilty verdict on both charges, David Darwin Donk, was sentenced as follows:

**CR 05 17485 - AGGRAVATED ASSAULT, (a felony), Idaho Code § 18-901; 18-905, committed on August 28, 2005 – to the custody of the Idaho State Board of Correction for a fixed term of ONE (1) year followed by an indeterminate term of NINE (9) years, for a total term not to exceed TEN (10) years.**

**CRF 2005 17633 - POSSESSION OF A CONTROLLED SUBSTANCE (METHAMPHETAMINE) (a felony), Idaho Code § 37-2732(c), committed on August 29, 2005 – to the custody of the Idaho State Board of Correction for a fixed term of ONE (1) year followed by an indeterminate term of FOUR (4) years, for a total term not to exceed FIVE (5) years.**

On April 7, 2006, Donk filed the instant I.C.R. 35 Motion requesting that he would like his "in determinit [sic] time cut in 1/2". Donk bases this motion on essentially a claim for leniency. Donk asks the Court to reconsider the sentences because of 1) improper

legal help by his public defender; and 2) because he is "taking all necessary courses to correct my thinking and abuse of meth".

The first ground for reconsideration, ineffective assistance of counsel, is not grounds for a I.C.R. 35 Motion made as a request for a reduction in sentence. Donk makes no claim that his counsel withheld evidence at the time of sentencing. Donk claims: "I don't think he did enuf [sic] for me and with held evidence that would have pruvn [sic] me nut [sic] guilty." his counsel did. The second ground for reconsideration Donk gives is that his performance in prison should be considered. At the time he filed his Rule 35 motion, Donk had spent less than a month in prison, and that is assuming he was transported the day after the sentencing hearing. 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*, 2004 Opinion No. 6, (January 21, 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. The allegation that Donk is "taking all necessary courses to correct my thinking and abuse of meth," is worthy of praise, but it is also exactly why he was sent to prison with the Therapeutic Community recommendation. A reduction in sentence would actually be counterproductive to Donk's recovery, as it would give him less incentive to do well in the Therapeutic Community, and it would give the Commission of Pardons and Parole less time to supervise him on parole, ensuring the public that he has learned what was necessary from the Therapeutic Community.

Donk requested a hearing. 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.

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).

The sentence imposed on March 9, 2006, was and is an appropriate sentence given Donk's social and criminal history and the crimes for which sentence was imposed. A lesser sentence would depreciate the seriousness of Donk's crimes. Specifically, a lesser indeterminate sentence would give the State of Idaho Commission of Pardons and Parole less opportunity to supervise Donk if he makes parole. If Donk does not make parole, society needs to be protected by the indeterminate portion of his sentence. I conclude that the sentence imposed was and is necessary for the protection of society and the deterrence of Donk and others.

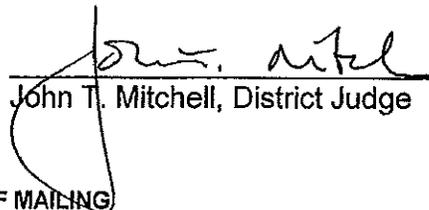
IT IS THEREFORE ORDERED that Donk's I.C.R. 35 Motion is DENIED.

**NOTICE OF RIGHT TO APPEAL**

YOU, Donk, 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 5<sup>th</sup> day of July, 2006.

  
John T. Mitchell, District Judge

**CERTIFICATE OF MAILING**

I hereby certify that on the 5 day of July, 2006 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney - Dennis Reuter/Val Seigel  
Prosecuting Attorney - Arthur Verharen/Donna Gardner

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

DAVID DARWIN DONK  
IDOC # 80681  
P. O. Box 70010  
Boise, ID 83707

CLERK OF THE DISTRICT COURT  
KOOTENAI COUNTY

BY:  Deputy

Stephen W. Kenyon, Clerk of the Courts,  
RE: Supreme Court No. 33055