

STATE OF IDAHO)
County of KOOTENAI) ss

FILED 11-4-10

AT 12:00 O'clock P. M
CLERK, DISTRICT COURT

Deputy
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.)
)
JEFFERY STORM FRANKS)
)
)
)
)
Defendant.)

Case No. **CRF 2009 3509**

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

(Leniency)

On May 1, 2009, Franks, was sentenced as follows:

ACCESSORY TO A FELONY, (a felony), Idaho Code § I. C. 18-205, committed on October 28, 2008 – 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.

THIS SENTENCE RUNS **CONCURRENT** WITH ANY SENTENCE IMPOSED IN CHARGES PENDING IN THE STATE OF OREGON, POSSESSION OF A CONTRTOLLED SUBSTANCE (SPEED) IN WASHINGTON COUNTY, HILLSBORO, OREGON, DATE OF OFFENSE ABOUT 10/18/08 AND POSSIBLE CASE NO. CO82645CR.

That sentence was pursuant to an I.C.R. 11 plea agreement which Franks signed on March 25, 2009, and that I.C.R. 11 plea agreement was re-affirmed in court on April 2, 2009, the date Franks pled guilty. On May 1, 2009, after announcing the above sentence, the Court, pursuant tot the I.C.R. 11 plea agreement, placed Franks on five years supervised probation, recommended an interstate compact to the State of Oregon, because the State of Oregon had a hold on Franks and Franks had told this Court that he

would serve two years in prison in Oregon, and would be receiving the intensive substance abuse treatment which he desperately needed.

Six days after sentencing, on May 7, 2009, Franks filed a Notice of Appeal, claiming the sole issue on appeal to be an "Abuse of judicial discretion to imposition of sentence." Notice of Appeal, p. 2. Note, sentence was not imposed at that time. On May 27, 2009, perhaps sensing the non-sequitur in his appeal, Franks attorneys, now the State Appellate Public Defender filed an Amended Notice of Appeal, adding (changing) the issue on appeal to be "Did the district court err in imposing an excessive sentence?" Amended Notice of Appeal, p. 2. The Court of Appeals of the State of Idaho announced its unpublished opinion on January 25, 2010, affirming this Court.

On November 30, 2009, a Report of Probation Violation was filed, alleging that Franks had absconded supervision. Franks was transported to Oregon after the proceedings before this Court, but Franks did not serve his two years in Oregon prison, and thus, did not get his inpatient drug treatment which he needed. Instead, he was placed on probation and shortly thereafter, absconded. On January 27, 2010, Franks appeared before this Court and admitted violating his probation. The Court continued the disposition aspect of his probation violation hearing to allow Franks the opportunity to provide proof to the Court that he was not lying to the Court at sentencing when he said that he'd face two years in prison. On February 24, 2010, Franks appeared before this Court. The Court, in an abundance of leniency, retained jurisdiction, stating that such result would get Franks as close as possible to his I.C.R. 11 plea agreement, and would get him the in custody drug treatment he'd been needing all along. On March 1, 2010, Franks filed a "Motion for Reconsideration of Sentence Pursuant to I.C.R. 35", as a "plea for leniency." On March 16, 2010, this Court entered its "Order Denying I.C.R. 35 Motion and Notice of Right to Appeal." The pertinent portion of that decision reads as follows:

On May 1, 2009, Jeffrey Storm Franks, was sentenced as follows:

Accessory to a Felony, (a felony), Idaho Code § 18-205, committed on October 28, 2008 – 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.

THIS SENTENCE RUNS CONCURRENT WITH ANY SENTENCE IMPOSED IN CHARGES PENDING IN THE STATE OF OREGON, POSSESSION OF A CONTROLLED SUBSTANCE (SPEED) IN WASHINGTON COUNTY, HILLSBORO, OREGON, DATE OF OFFENSE ABOUT 10/19/08 AND POSSIBLE CASE NO CO82645CR.

Franks was placed on probation. This was essentially an agreed upon resolution between Franks, and the State. The component that the sentence run concurrent with the Oregon sentence, and the component of probation, were agreed upon terms under I.C.R. 11. At the May 1, 2009, sentencing, given Franks' incredibly extensive serious criminal record (a quick review of his low IDOC number will make such obvious), this Court initially refused to go along with the I.C.R. 11 plea agreement because it was too lenient, and this Court stated Franks needed to do prison time on this new Idaho crime. In the end, this Court reluctantly went along with the idea of probation, but only given the assurances of Franks and his counsel that he would spend at least six more months in Oregon prison getting chemical dependency treatment. The idea behind the agreement was Franks still had two years left in prison in the State of Oregon, that he had a hold on him from Oregon and that he would serve at least six months of that sentence and receive some much needed chemical dependency treatment in the Oregon prison system. Those were the representations made by Franks, his attorney, and the deputy prosecutor. This Court relented. The taxpayers of the State of Idaho and Kootenai County have paid for Franks' complaints ever since.

Even though Franks at sentencing received all he asked for, one week after sentencing, on May 7, 2009, Franks, through his Court appointed Kootenai County Deputy Public Defender, filed a Notice of Appeal claiming this Court committed "Abuse of judicial discretion in imposition of sentence." Notice of Appeal, p. 2. On May 27, 2009, through his Court appointed State Appellate Public Defender, Franks filed an Amended Notice of Appeal. On January 25, 2010, the Idaho Court of Appeals filed an unpublished opinion affirming this Court's May 1, 2009, sentencing decision.

Now, back to the plan Franks and his attorney sold to this Court on May 1, 2009. That plan unraveled when two things happened. First, Franks was placed on probation, and was not sent to Oregon prison. Did Franks know that would happen when he convinced this Court to accept his I.C.R. 11 plea agreement? That cannot be proved. However, Franks' bad intentions can be proven by what happened next. Second, while on probation, Franks immediately *absconded* from that probation. This Court issued a warrant and Franks was apprehended.

On December 1, 2009, a Report of Probation Violation was filed,

alleging Franks had absconded supervision. On February 24, 2010, Franks appeared before this Court, and this Court placed Franks on a retained jurisdiction in the State of Idaho. Such resolution would give Franks the opportunity to have the chemical dependency treatment in the Idaho prison system.

On March 1, 2010, Franks filed the instant I.C.R. 35 Motion requesting that this Court “reconsider the Judgment and Sentence entered herein February 24, 2010.” Franks bases this motion on “a plea for leniency.” Motion for Reconsideration, p. 1.

II. ANALYSIS.

A. Request for a Hearing.

In his motion, Franks requested a hearing. A motion to modify a sentence “shall be considered and determined by the court without the admission of additional testimony and without oral argument, unless otherwise ordered by the court in its discretion.” I.C.R. 35; see *State v. Copenhagen*, 129 Idaho 494, 496, 927, P.2d 884, 886 (1996); *State v. James*, 112 Idaho 239, 242, 731 P.2d 234, 2370 (Ct.App. 1986) (it is the defendant’s burden to present any additional evidence and the court cannot abuse its discretion in “...unduly limiting the information considered in deciding a Rule 35 motion”); *State v. Puga*, 114 Idaho 117, 118, 753 P.2d 1263, 1264 (Ct.App. 1987). Even though a hearing was requested, “[t]he 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, 525, 887 P.2d 67, 70 (Ct.App. 1994); citing *State v. Findeisen*, 119 Idaho 903, 811 P.2d 513 (Ct.App. 1991). The Court has reviewed the Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, the Court minutes and the pre-sentence report. Nothing could be presented at a hearing that would benefit the Court. A hearing would waste counsel and the Court’s time. Between the Kootenai County Public Defender, the State Appellate Public Defender, the Idaho Court of Appeals and this Court, enough time has been wasted. Enough public resources have been expended dealing with Franks’ complaints about the agreement he wanted.

B. Timeliness of the I.C.R. 35 Motion.

On March 1, 2010, Franks filed the instant I.C.R. 35 Motion. Idaho Criminal Rule 35 provides in pertinent part:

The court may correct an illegal sentence at any time and may correct a sentence that has been imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the filing of a judgment of conviction or within 120 days after the court releases retained jurisdiction. The court may also reduce a sentence upon revocation of probation or upon motion made within fourteen (14) days after the filing of the order revoking probation.

The sentence was imposed on May 1, 2009. That sentence is within the range of lawful sentences for the crimes for which those sentences

were imposed. Franks has failed to even suggest any basis for determining that the imposed sentences are illegal sentences. Since they are legal sentences, under I.C.R. 35, the 120 day time period applies.

Under the facts of this case, the last day Franks could have filed an I.C.R. 35 motion in this action was 120 days after May 1, 2009. This court is without jurisdiction to grant leniency under I.C.R. 35. See *State v. Sutton*, 113 Idaho 832, 748 P.2d 416 (Ct. App. 1988).

C. Leniency.

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. *Id., Strand; 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 (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. Toolhill*, 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 sentence imposed on May 1, 2009, was and is an appropriate sentence given Franks' social and extensive criminal history and the crime for which sentence was imposed. A lesser sentence would depreciate the seriousness of Franks' crimes. This Court concludes that the sentence imposed was and is necessary for the protection of society and the deterrence of Franks and others.

Because of the passage of time, Franks is precluded from requesting this Court reconsider the underlying sentence. Thus, it can only be inferred that Franks is asking this Court to reconsider the fact that this Court revoked Franks' probation and sent Franks on a retained jurisdiction program. Given Franks' extensive criminal record, the fact that he did not go to prison in Oregon as planned, and then immediately absconded Oregon probation once he providently gained probation, his inability to deal with his addictions, at least up to this point, there is simply no way for this

Court to reconsider its decision and place Franks on probation.

If Franks is requesting this Court to reconsider its decision and simply send Franks to an Idaho prison to serve out the rest of his term, this Court would be more than happy to satisfy that request. Franks would need to make that desire clear to this Court. Otherwise, Franks is simply wasting this Court's time. The fact that Franks made his I.C.R. 35 Motion at this juncture, would tend to indicate that Franks himself is delusional about his current ability to be placed on probation, and would tend to indicate that Franks may not be taking his six-month prison based chemical dependency program serious. This Court will keep the fact that Franks has made this I.C.R. 35 Motion in mind at Franks' jurisdictional review hearing later in 2010. The attitude of Franks in his March 1, 2010, I.C.R. 35 Motion is made even more disturbing when it is coupled with the fact that he appealed to the Idaho Supreme Court, the sentencing outcome *for which he bargained* and for which this Court was extremely reluctant to give.

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

March 16, 2010, Order Denying I.C.R. 35 Motion and Notice of Right to Appeal, pp. 1-6.

On April 7, 2010, Franks filed a Notice of Appeal of this Court's decision on Franks' I.C.R. 35 motion, and Franks stated his issues on appeal were: "(a) Did the district court err in finding defendant violated the terms of his probation [even though he absconded and admitted violating the terms of his probation]; (b) Did the district court err in imposing and retaining jurisdiction; and (c) Did the district court err in denying defendant's Motion for Reconsideration of Sentence?" That appeal is pending.

On August 4, 2010, this Court received a report from Darla Maqueda, Psychosocial Rehabilitation Specialist for the State of Idaho Department of Correction, Which stated Franks refused to be transported to his retained jurisdiction programs at North Idaho Correctional Institution. A hearing was held on August 18, 2010, and at Franks' request, that hearing was continued. A hearing was scheduled for August 30, 2010. On August 27, 2010, Franks filed a Motion to Continue that August 27, 2010, hearing, and this Court denied that motion and relinquished jurisdiction because Franks had exceeded his 180-day time limitation under I.C. § 19-2601. The hearing went forward, and at the conclusion of the August 30, 2010, the Court rescinded its finding that

jurisdiction was relinquished, extended its jurisdiction for the maximum thirty additional days (beyond the 180 days) allowed under I.C. § 19-2601, and set another hearing for September 9, 2010. On September 9, 2010, the Court relinquished its jurisdiction, sent Franks to prison and recommended the Therapeutic Community for Franks' drug problem. On October 20, 2010, Franks filed his second "Motion for Reconsideration of Sentence Pursuant to I.C.R. 35", as a "plea for leniency". A hearing was requested by Franks, but Franks' counsel did not reserve a time for that hearing. No notice of hearing was ever filed by Franks or Franks' counsel.

Franks' "Motion for Reconsideration of Sentence Pursuant to I.C.R. 35" filed on October 20, 2010, is untimely. Franks' probation was revoked on February 24, 2010. I.C.R. 35 reads in part: "The court may also reduce a sentence upon revocation of probation or upon motion made within fourteen (14) days after the filing of the order revoking probation." Franks last day to file this I.C.R. 35 Motion was about March 11, 2010. Franks is more than seven months too late. No hearing is necessary on this second I.C.R. 35 Motion, for the same reasons as enumerated on Franks' first I.C.R. Motion, as set forth above.

IT IS THEREFORE ORDERED that Franks's second I.C.R. 35 Motion filed October 20, 2010, is **DENIED**.

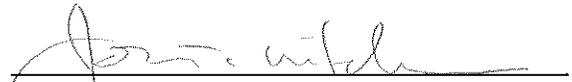
NOTICE OF RIGHT TO APPEAL

YOU, Franks, 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 4th day of November, 2010.


John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 4 day of November, 2010 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

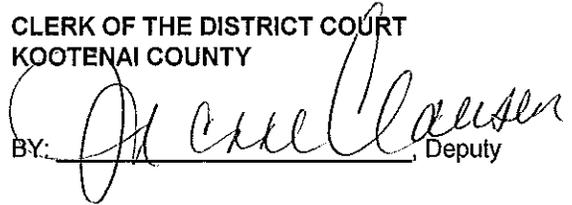
Defense Attorney – Jed Nixon *FAX*
Prosecuting Attorney - *446-1833*

JEFFERY STORM FRANKS ✓
IDOC # 29611

Probation & Parole *769-1481*

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

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: 
Deputy