

FILED _____

AT _____ O'clock ___ 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.)
)
GARY L. PAYNE)
DOB: 6-20-50)
SSN:)
IDOC: 53218)
)
Defendant.)

Case No. **CRF 2006 4173**

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

On December 17, 2008, Gary L. Payne, was sentenced as follows:

COUNT I – ISSUING A CHECK WITHOUT FUNDS, (a felony), Idaho Code § 18-3106, committed on OCTOBER 30, 2003 – to the custody of the Idaho State Board of Correction for a fixed term of ZERO (0) years followed by an indeterminate term of THREE (3) years, for a total term not to exceed THREE (3) years.

COUNT II – GRAND THEFT, (a felony), Idaho Code § 18-2403 committed on OCTOBER 30, 2003 – to the custody of the Idaho State Board of Correction for a fixed term of TWO (2) YEARS followed by an indeterminate term of TWELVE (12) years, for a total term not to exceed FOURTEEN (14) years.

COUNT III – GRAND THEFT, (a felony), Idaho Code § 18-2403 committed on OCTOBER 30, 2003 – to the custody of the Idaho State Board of Correction for a fixed term of TWO (2) YEARS followed by an indeterminate term of TWELVE (12) years, for a total term not to exceed FOURTEEN (14) years.

COUNT IV – ISSUING A CHECK WITHOUT FUNDS, (a felony), Idaho Code § 18-3106, committed on OCTOBER 28, 2003 – to the custody of the Idaho State Board of Correction for a fixed term of ZERO (0) years followed by an indeterminate term of THREE (3) years, for a total term not to exceed THREE (3) years.

THESE SENTENCES RUN CONCURRENT.

This Court imposed these prison sentences on that date and sent Payne to prison with a recommendation for the Therapeutic Community.

On January 30, 2009, Payne filed the instant I.C.R. 35 Motion requesting the court "...for a reduction of the current sentence. This motion is made as a plea for leniency based on Rule 35 of the Idaho Rules of Criminal Procedure, and is supported by the attached affidavit of Peter Jones." Also filed on January 30, 2009, is the "Affidavit of Peter Jones." The Affidavit of Peter Jones states that the Idaho bench warrant from this Court "...was not technically served on him [Gary Payne] at this time [when he was initially booked upon his arrest in Spokane County, Washington], Gary Payne's ability to bond out was effectively restricted based on the existence of this [this Court's] warrant." Affidavit of Peter Jones, p. 1, ¶ 3. Payne's attorney attached to his affidavit "...the letters received by this office from Gary Payne further detailing his reasons for a reduction in sentence." *Id.*, p. 2, ¶ 4. On February 10, 2009, Payne filed an "Addendum to Rule 35 Motion", which simply stated that Payne "...hereby submits the following second affidavit of Peter Jones in support of the pending Rule 35 Motion." Also on February 10, 2009, Payne filed the Second Affidavit of Peter Jones, attaching a purported affidavit of Payne. This Court treats that as an affidavit, although it does not meet the requirements.

Unfortunately, as has been a problem in the past in other cases involving the law office of Douglas Phelps and Peter Jones, no certificate of mailing is provided at the end of any of the above described pleadings filed January 30, 2009, and February 10, 2009, showing that a copy of such pleadings have been sent to the Kootenai County Prosecuting Attorney. Nor has there a separate pleading as a certificate of mailing been filed by the office of Douglas Phelps and Peter Jones, showing a copy of these pleadings filed January 30, 2009, and February 10, 2009, was sent to the Kootenai County Prosecuting Attorney. Thus, this Court has no way of knowing if the Kootenai County Prosecuting Attorney is aware that Payne has filed an I.C.R. 35 Motion. Any possible *ex parte* problem created by

Payne's attorney will have to be taken up by Payne's attorneys with the Kootenai County Prosecuting Attorney. This Court has determined no response is necessary from the Kootenai County Prosecuting Attorney (whether given notice of the I.C.R. 35 Motion or not), given the nature of the relief sought by Payne. A copy of all these pleading is being sent to the Kootenai County Prosecuting Attorney along with that office's copy of this Order Denying I.C.R. 35 Motion.

Payne has not requested a hearing in any of these pleadings. Had a hearing been 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.

In Payne's various writings, Payne expressed dissatisfaction with his attorneys, yet that provides no basis for I.C.R. 35 relief. Payne expresses dissatisfaction with his sentence imposed by this Court, upset because he did not receive a retained jurisdiction. Payne seems to be unable to realize that the I.C.R. 11 plea agreement that he entered into on October 9, 2007, for a "retained jurisdiction", was abrogated by Payne when he failed to show up for his December 17, 2007, sentencing hearing. A warrant was issued by this Court on December 17, 2007. Although a warrant was issued, given the explanation Payne's attorney gave in court on December 17, 2007, for Payne's absence on December 17, 2007, (that Payne was in Seattle on business), this Court scheduled a sentencing hearing for December 20, 2007, for Payne to attend the re-scheduled sentencing hearing, and perhaps be able to argue to the Kootenai County prosecutor in the first instance and

this Court in the second instance, that he had not abrogated his plea agreement by not attending his sentencing hearing on December 17, 2007. However, Payne chose not to attend court on December 20, 2007. Not only that, but Payne then chose to absent himself from this Court until October 31, 2008, when this Court's warrant was served on Payne in custody in Washington.

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 December 17, 2008, was and is an appropriate sentence given Payne's social and criminal history and the crimes for which sentence was imposed. A lesser sentence would depreciate the seriousness of Payne's crimes. I conclude that the sentence imposed was and is necessary for the protection of society, the deterrence of Payne and others, for Payne's possible rehabilitation, and that Payne is not an acceptable risk to be rehabilitated in the community.

Payne is not entitled to any additional credit for time served. While "Payne's ability to bond out was effectively restricted based on the existence of this [this Court's] warrant" (Affidavit of Peter Jones, p. 1, ¶ 3), this Court's warrant was not served upon Payne until October 31, 2008, and Payne has been given credit for that time. Even Payne's attorney

concedes Payne is not “technically” entitled to credit for time served prior to that date. *Id.* This Court finds Payne is not only not “technically” entitled to credit for time served prior to October 31, 2008, but not in any way shape or form entitled to credit for time served prior to October 31, 2008.

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

NOTICE OF RIGHT TO APPEAL

YOU, Gary L. Payne, 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 12th day of February, 2009.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of February, 2009, copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney – Douglas D. Phelps
Prosecuting Attorney – Barry McHugh, w/enclosures

GARY L. PAYNE
IDOC # 53218
Shoshone Co. Public Safety Building
717 Bank St.
Wallace, ID 83873

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

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____, Deputy