

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.)
)
SHANE THOMAS PELLETIER)
)
) DOB: 03-18-88)
) SSN: 517-19-4248)
) IDOC: 87633)
)
) Defendant.)
)
_____)

Case No. **CRF 2007 14646**

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

On October 30, 2007, SHANE THOMAS PELLETIER, was given the benefit of a withheld judgment. On April 29, 2009, a Report of Violation was filed, and on July 20, 2009, admissions were entered to those probation violations and SHANE THOMAS PELLETIER was sentenced, to wit:

POSSESSION OF A CONTROLLED SUBSTANCE (COCAINE), To the custody of the Idaho Board of Correction for a fixed term of TWO (2) years, followed by an indeterminate term of THREE (3) years, for a total term of FIVE (5) years.

On July 20, 2009, Pelletier was sent of a period of retained jurisdiction, and on January 6, 2010, this Court placed him on probation following his period of retained jurisdiction. On June 24, 2010, another Report of Violation was filed. On June 28, 2010, this Court issued a bench warrant for his arrest which was not served until October 8, 2010. On November 23, 2010, this Court placed Pelletier on a second retained jurisdiction, this time, recommending the CAPP chemical dependency program. This was the outcome

recommended by his probation officer in the June 24, 2010, Report of Violation.

On January 6, 2011, Pelletier filed his “Motion for Reconsideration of Sentence Pursuant to I.C.R. 35. That motion simply states it is a plea for “leniency.” A hearing was requested by Pelletier’s attorney, but no hearing date or time has been requested by Pelletier’s attorney. No hearing has been noticed up.

A motion to modify a sentence “shall be considered and determined by the court without the admission of addition 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). Because the Court lacks jurisdiction to hear Pelletier’s motion, a hearing would only waste counsel and the Court’s time.

I.C.R. 35 provides in part that

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 imposed on July 20, 2008, is within the range of lawful sentences for

the crime for which sentence was imposed. Pelletier has failed to even suggest any basis for determining that the imposed sentence is an illegal sentence. Since it is a legal sentence, under I.C.R. 35, the 120 time period applies.

Under the facts of this case, the last day could have filed an I.C.R. 35 motion in this action was 120 days after July 20, 2008. 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).

The 120-day period for filing for relief under I.C.R. 35 begins running from the initial pronouncement of the sentence, not from the time probation is revoked and the original suspended sentence is reinstated. *State v. Liggins*, 113 Idaho 62, 741 P.2d 349 (Ct.App. 1987). This rule does not equate the revocation of probation with the imposition of sentence, triggering a new 120-day filing period. *State v. Sutton*, 113 Idaho 832, 748 P.2d 416 (Ct.App. 1987). This Court lacks jurisdiction to hear Pelletier's motion.

Finally, the Court has reviewed the Motion for Reconsideration of Sentence Pursuant to I.C.R. 35, the Court minutes and the pre-sentence report, indeed, Pelletier's entire file. There is nothing that could be presented at a hearing that could change the Court's sentencing decision or the decision to place Pelletier on a second retained jurisdiction.

IT IS THEREFORE ORDERED that 's I.C.R. 35 motion is **DENIED** and the same hereby is dismissed for lack of jurisdiction. Since the Court has no jurisdiction to hear the I.C.R. 35 motion.

NOTICE OF RIGHT TO APPEAL

YOU, , 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 21st day of January, 2011.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of January, 2011 copies of the foregoing were mailed, postage prepaid, or sent by interoffice mail or facsimile to:

Defense Attorney - Jed Whitaker
Prosecuting Attorney -

SHANE THOMAS PELLETIER
IDOC # 87633

Probation & Parole

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

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____, Deputy