

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37777

STATE OF IDAHO,)	2011 Unpublished Opinion No. 498
)	
Plaintiff-Respondent,)	Filed: May 27, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
STACEY MARIE COX,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Patrick H. Owen, District Judge.

Judgment of conviction and unified sentence of twenty years, with a minimum period of confinement of ten years, for forcible sexual penetration with a foreign object, affirmed; order denying motion for appointment of counsel, affirmed.

Molly J. Huskey, State Appellate Public Defender; Jordan E. Taylor, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Russell J. Spencer, Deputy Attorney General, Boise, for respondent.

Before LANSING, Judge, GUTIERREZ, Judge
and MELANSON, Judge

PER CURIAM

Stacey Marie Cox appeals from her judgment of conviction and unified sentence of twenty years, with a minimum period of confinement of ten years, for forcible sexual penetration with a foreign object, I.C. § 18-6608. She also appeals the denial of her motion for appointment of counsel to pursue her Idaho Criminal Rule 35 motion. We affirm.

I.

BACKGROUND

Following complaints of unsanitary and unsafe living conditions for Cox’s four children, two boys and two girls, police executed a search warrant to investigate the living conditions.

Police found Cox's residence had a strong odor of urine, feces, and dirty laundry. The entire residence was filthy and unsafe. The police therefore arrested Cox and referred the children to CARES for an evaluation. The evaluation revealed that the children were being sexually abused, as all had injuries to their anuses, the girls had scarring around their vaginas, and one boy had a laceration on his penis. The boy stated the laceration was from his mother cutting him with a knife.

Cox gave police multiple stories concerning the abuse. She initially denied any knowledge, then accused her husband--the children's father--of perpetrating the abuse, then admitted to committing the acts herself, and then accused a third party. Cox ultimately pled guilty to the instant offense, one count of forcible sexual penetration with a foreign object. At the plea hearing, she admitted to sexually abusing her three-year-old daughter on multiple occasions by inserting the handles of a spatula, knives, forks, toothbrushes, and pens into her daughter's vagina to punish her for toilet-training accidents.

Cox participated in a presentence investigation and a psychosexual evaluation. In both, Cox related that she had suffered extreme sexual and physical abuse as a child. She was placed in a stable foster home in her teenage years where she was given the opportunity to develop herself academically and participate in various sports activities. Cox has borne seven children. The first child she gave up for adoption. She voluntarily relinquished her rights to the next two children after failing to prevent her then-husband from physically abusing one of them. Cox's last four children were fathered by her current husband and were subjected to sexual abuse. As stated above, her stories concerning the abuse have not been consistent. At one point she admitted to inserting foreign objects into the children's anuses and the female children's genitals, and pricking the male children's penises, as a form of punishment. She stated she did this alone, and then she stated she did this while her husband held the children down. She also stated at one point that she had seen her husband molest her children but did nothing to stop the abuse. The presentence investigation report made clear that all this was in spite of the fact that, due to a number of complaints concerning possible unsafe living conditions and abuse, the Department of Health and Welfare had been actively addressing problems with Cox for a period before the instant sexual abuse came to light. The psychosexual evaluator, after noting that research concerning general recidivism rates by female sexual offenders is not extensive as yet, concluded

that, at minimum, Cox posed a high risk to continue to expose her own children to potentially harmful and unsafe circumstances.

The district court entered a judgment of conviction, imposing and executing a unified sentence of twenty years with ten years determinate. Cox filed an Idaho Criminal Rule 35 motion for reduction of her sentence and requested counsel. The district court declined to appoint counsel and denied the I.C.R. 35 motion after finding the motion was frivolous. Cox now appeals, arguing that her sentence is excessive and that the district court erred in denying her I.C.R. 35 motion for reduction of sentence and denying her request for appointed counsel to represent her on the motion.

II.

ANALYSIS

A. Excessive Sentence

Where a sentence is within the statutory limits, it will not be disturbed on appeal absent an abuse of the sentencing court's discretion. *State v. Hedger*, 115 Idaho 598, 768 P.2d 1331 (1989). We will not conclude on review that the sentencing court abused its discretion unless the sentence is unreasonable under the facts of the case. *State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992). In evaluating the reasonableness of a sentence, we consider the nature of the offense and the character of the offender, applying our well-established standards of review. *See State v. Hernandez*, 121 Idaho 114, 117-18, 822 P.2d 1011, 1014-15 (Ct. App. 1991); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984); *State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant's entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

Having reviewed the record, we conclude that the district court did not abuse its discretion in imposing Cox's sentence. Cox committed heinous crimes against at least one of her daughters whom she punished for toilet-training accidents and wetting the bed by inserting handles of spatulas, knives, forks, and pens into the child's vagina. She also admitted to similar abuse of her other children, including pricking them on their genitals with pins, but later recanted this admission. These offenses occurred despite Cox's prior loss of parental rights to two children because she failed to protect them from abuse and despite intervention by the Department of Health and Welfare. The sentencing court did take into consideration mitigating evidence, such as Cox's childhood abuse. However, it did not err in finding that Cox was given

ample opportunity and resources to overcome these circumstances and that her harsh childhood did not excuse her actions against her own children. The court determined Cox was a continued danger to children with which she had contact. Cox's sentence is not unreasonable under the facts of this case.

B. Failure to Appoint Counsel for I.C.R. 35 Motion and Denial of I.C.R. 35 Motion

The district court denied Cox's motion for appointment of counsel because it determined that Cox's Rule 35 motion was frivolous.

A criminal defendant has a right to counsel at all critical stages of the criminal process, including pursuit of an I.C.R. 35 motion. I.C. §§ 19-851, 19-852; I.C.R. 44; *State v. Wade*, 125 Idaho 522, 523, 873 P.2d 167, 168 (Ct. App. 1994); *Murray v. State*, 121 Idaho 918, 923 n.3, 828 P.2d 1323, 1328 n.3 (Ct. App. 1992). Although a defendant has a right to hire a private attorney in an I.C.R. 35 proceeding, appointed counsel at this stage may be denied if the trial court finds that the motion "is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding." I.C. § 19-852(b)(3); *Wade*, 125 Idaho at 523, 873 P.2d at 168. Thus, a defendant may be denied appointment of counsel to assist in pursuing an I.C.R. 35 motion if the trial court finds the motion to be frivolous. *Wade*, 125 Idaho at 523-24, 873 P.2d at 168-69. Whether a motion is frivolous is a question of law that we freely review. *Id.* at 525, 873 P.2d at 170.

A motion for reduction of a sentence under I.C.R. 35 is essentially a plea for leniency, addressed to the sound discretion of the court. *State v. Knighton*, 143 Idaho 318, 319, 144 P.3d 23, 24 (2006); *State v. Allbee*, 115 Idaho 845, 846, 771 P.2d 66, 67 (Ct. App. 1989). In presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the motion. *State v. Huffman*, 144 Idaho 201, 159 P.3d 838 (2007). In conducting our review of the grant or denial of a Rule 35 motion, we consider the entire record and apply the same criteria used for determining the reasonableness of the original sentence. *State v. Forde*, 113 Idaho 21, 22, 740 P.2d 63, 64 (Ct. App. 1987); *Lopez*, 106 Idaho 447, 680 P.2d 869.

On appeal, Cox asserts her I.C.R. 35 motion had merit, and therefore she should have been provided counsel, for two reasons. First, she argues that because the psychosexual evaluator stated only that she was a continuing risk to her *own* children, and she is unable to have more children and has lost her parental rights to all her current children, she is not a danger to

society. Second, she asserts that she has demonstrated progress while in prison that indicates her amenability to rehabilitation.

Cox's argument that is predicated on her inability to give birth to more children is meritless. The sentencing court went further than the psychosexual evaluator in specifically finding that Cox was a risk to children in general, not just her own. Her inability to have more children is no assurance that she will never have access to other children that she could abuse. Furthermore, that Cox is unable to have more children was disclosed in the presentence investigation report, and the fact that she had lost her parental rights to all her children was disclosed to the court at sentencing. Therefore, this is not new and additional information, which is required in order to present a colorable I.C.R. 35 claim as required by *Huffman*.

Cox's progress while in prison is of minimal significance because, while such is worthy of consideration, it may not be an accurate indicator of future behavior in a noncustodial setting when viewed in context of the entire record. *State v. Gain*, 140 Idaho 170, 176, 90 P.3d 920, 926 (Ct. App. 2004); *State v. Findeisen*, 119 Idaho 903, 905, 811 P.2d 513, 515 (Ct. App. 1991). The district court did not abuse its discretion in holding that these arguments advanced by Cox in support of her Rule 35 motion were meritless, and therefore denying her request for counsel at public expense and denying her request for reduction of the sentence.

III.

CONCLUSION

The judgment of conviction and sentence and the orders denying Cox's motion for appointment of counsel and her Rule 35 motion are affirmed.