

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37142

STATE OF IDAHO,	)	2011 Unpublished Opinion No. 504
	)	
<b>Plaintiff-Respondent,</b>	)	<b>Filed: June 6, 2011</b>
	)	
v.	)	<b>Stephen W. Kenyon, Clerk</b>
	)	
ARMANDO GARCIA,	)	<b>THIS IS AN UNPUBLISHED</b>
	)	<b>OPINION AND SHALL NOT</b>
<b>Defendant-Appellant.</b>	)	<b>BE CITED AS AUTHORITY</b>
	)	

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Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Timothy Hansen, District Judge.

Orders denying motion to dismiss and Idaho Criminal Rule 35 motion, affirmed.

Molly J. Huskey, State Appellate Public Defender; Spencer J. Hahn, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

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GRATTON, Chief Judge

Armando Garcia appeals from the district court’s orders denying his motion to dismiss and denying his Idaho Criminal Rule 35 motion. We affirm.

**I.**

**FACTUAL AND PROCEDURAL BACKGROUND**

Garcia was charged, in this case, with trafficking in heroin in an amount between two and seven grams. Idaho Code § 37-2732B(a)(6). Garcia filed a motion to dismiss on the grounds of vindictive prosecution, which the district court denied. Pursuant to a plea agreement, Garcia entered a conditional guilty plea, reserving the right to appeal the district court’s denial of his motion to dismiss. The district court imposed a unified sentence of thirty years with three years determinate. Idaho Code § 37-2732B(a)(6)(A) carries a mandatory three-year minimum

sentence.<sup>1</sup> Garcia filed a motion to withdraw his guilty plea and a Rule 35 motion for leniency. After conducting a hearing on the motion to withdraw, the district court entered orders denying Garcia's motion to withdraw his guilty plea and Rule 35 motion. Garcia appeals.

## II. ANALYSIS

Garcia claims that the district court erred in denying his motion to dismiss and by failing to consider the new information provided in support of his Rule 35 motion. He does not appeal the district court's denial of his motion to withdraw his guilty plea. In regard to the motion to dismiss, Garcia states: "Mindful of the fact that his Fourteenth Amendment vindictive prosecution argument is foreclosed by *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), Mr. Garcia nonetheless asserts that the district court erred when it denied his motion to dismiss." Garcia's motion to dismiss was premised on the claim that in prosecuting the second trafficking case, the prosecutor's motivation was to subject him to a greater punishment and to penalize him for exercising his right to a jury trial and his right to remain silent in his other case. The district court noted that both *Bordenkircher* and *State v. Rodriguez-Perez*, 129 Idaho 29, 921 P.2d 206 (Ct. App. 1996) held that the Due Process Clause of the Fourteenth Amendment is not violated when, in the give and take of plea bargaining, a defendant is openly presented with the unpleasant alternatives of forgoing trial or subjecting himself to prosecution for other charges. Garcia has presented no argument or authority by which to distinguish the holding in these cases. A party waives an issue on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996). The district court did not err in denying Garcia's motion to dismiss.

Garcia filed his Rule 35 motion on November 19, 2009. The motion was held by the district court until after the hearing on Garcia's motion to withdraw his guilty plea. The order denying the Rule 35 motion was signed by the district court on April 16, 2010, and filed on

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<sup>1</sup> Garcia was also charged with trafficking in twenty-eight or more grams of heroin in a separate case, which carries a mandatory minimum sentence of fifteen years. I.C. § 37-2732B(a)(6)(C). The two cases were consolidated for trial. After the district court denied Garcia's motion to suppress in that case, pursuant to a plea agreement, he entered a guilty plea to a reduced charge of trafficking in seven or more grams of heroin, which carries a mandatory minimum sentence of ten years. The district court imposed a unified concurrent sentence of thirty years with fifteen years determinate.

April 27, 2010. On April 23, 2010, however, Garcia filed, pro se, a supplement to his Rule 35 motion. He claims that the district court abused its discretion by not considering the information provided in the supplementation.

The State contends that Garcia waived his right to appeal the district court's decision on the Rule 35 motion. The Rule 11 plea agreement contained the following language:

The Parties agree the Defendant may preserve for appeal the denial of his motion to dismiss for vindictive prosecution, but Defendant agrees to waive his right to appeal the case beyond that single issue, meaning any issue for appeal beyond the above-mentioned motion to dismiss is waived.

The State and Garcia further reference dialogue with the district court regarding the agreement after it was entered. However, this dialogue regarding the agreement does not change its plain terms. Garcia waived the right to appeal "any issue" in the case except for the denial of his motion to dismiss for vindictive prosecution.

Even if Garcia had not waived his right to appeal, the State further argues that the supplementation was untimely and that the district court had indicated on the record that the Rule 35 motion was fully submitted at a hearing conducted on April 9, 2010. At the hearing, the district court referenced the Rule 35 motion, which had been pending for nearly five months, and inquired as to whether the parties wished to present additional information. Both parties declined and the district court indicated that it deemed the motion submitted. Garcia was in attendance at the hearing. While Garcia now argues that he was not personally asked whether he had additional information for the Rule 35 motion, he did not so indicate and, as noted, his counsel declined on his behalf. The district court indicated the matter was submitted on April 9, 2010, before Garcia's belated supplement. The district court's opinion notes that in the nearly five months that the motion to withdraw was pending, Garcia had asked for time to submit additional information and, in fact, had received more time than he had requested. Garcia did not ask the district court whether it had or would consider the information filed after the order was signed, but before it was filed by the clerk's office. Instead, Garcia chose to appeal on the grounds of abuse of discretion by the district court.

The record demonstrates that the information provided was either not new or directly contradicted by Garcia himself. A motion for reduction of 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, 203, 159 P.3d 838, 840 (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); *State v. Lopez*, 106 Idaho 447, 449-51, 680 P.2d 869, 871-73 (Ct. App. 1984). The information which Garcia claims is new and should have been reviewed by the district court is an eleven-page handwritten document, the vast majority of which is redundant to information contained in the record. The claimed “new” information is that he was receiving medicinal doses of methadone from a clinic when he was approached by the informant and that prior to that time he had not relapsed or dealt drugs. He states that the DEA knew or should have known that he was a registered drug addict and under the care of Allied Health Services and Dr. Stone. He further claims that he was clean up to about the time of arrest. The PSI reflects that Garcia is an addict. He claimed to be more on the “demand” side than the “supply” side. Garcia told the PSI investigator that he began methadone treatments at Allied Health Services in Oregon in 2005. However, the PSI also states:

Mr. Garcia reported he was “kicked out” of the program in 2007 and explained, “rumor was that I was selling shit outside their compound.” Mr. Garcia stated that he was not selling anything and was angry that nobody asked him for his side of the story. He said he threatened to sue them, because he could not just quit “cold turkey.” Mr. Garcia blamed Allied Health Services for relapsing and felt they should have listened to his side of the story.

Mr. Garcia stated when he was no longer in the methadone clinic his Heroin usage became much worse. He said he was using Heroin several times a day and when he was asked if he wanted to “pool funds” to purchase some Heroin he decided it would be a good idea. Mr. Garcia informed me several times throughout the interview that he would never cheat or steal for the drug and felt buying and selling “a little bit” was a good way to pay his bills and maintain his habit.

The information in the PSI states that Garcia was purchasing and selling heroin for over a year prior to his arrest in December of 2007. To the extent the supplement contains any new information, it is directly contradicted by the record. Garcia contends that this new information, together with information known at sentencing--although he waived his right to and did not directly appeal his sentence--demonstrates that the sentence is excessive. Garcia has failed to demonstrate that the district court abused its discretion in denying his Rule 35 motion.

**III.**  
**CONCLUSION**

The district court did not err in dismissing Garcia's motion to dismiss. The district court did not abuse its discretion in denying Garcia's Rule 35 motion. Therefore, the district court's orders denying Garcia's motion to dismiss and Rule 35 motion are affirmed.

Judge LANSING and Judge GUTIERREZ **CONCUR.**