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State v. Gerdon Respondent's Brief Dckt. 39396

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 39396
)	
vs.)	
)	
JAMES GERDON,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS**

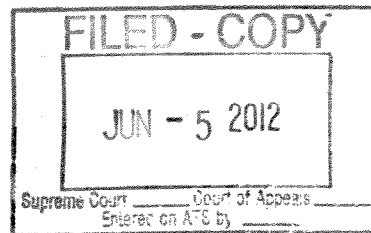
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STATEMENT OF THE CASE

Nature Of The Case

James Gerdon appeals from the district court's order denying his amended motion to vacate and his motion to withdraw his guilty plea filed more than five years after entry of judgment.

Statement Of Facts And Course Of Proceedings

Gerdon pled guilty to two counts of sexual abuse of a minor child under the age of sixteen, three counts of lewd conduct with a minor under sixteen, and two counts of attempted lewd conduct with a minor child under sixteen and entered an Alford plea to two counts of sexual abuse of a minor under sixteen. (R., pp.112-14, 118-31.) The victims in this case were three boys, ages twelve, eleven, and ten. (PSI, p.2.) The district court entered judgment on February 17, 2004, imposing concurrent sentences of fifteen years for the sexual abuse of a minor charges and attempted lewd conduct charges, and thirty years with fifteen years fixed for the lewd conduct charges. (R., pp.166-68, 172-74.) The Court of Appeals affirmed Gerdon's conviction and sentences and the remittitur was issued on July 5, 2005. (R., pp.202-04.)

On August 29, 2011, Gerdon filed an "Amended notion [sic] to vacate" with an accompanying affidavit asserting that the court never ruled on a previously filed motion to overturn the verdict, he had ineffective counsel, and the prosecution failed to follow the plea agreement. (R., pp.268-303.) The court denied this motion on September 30, 2011, finding it untimely, that the court lacked jurisdiction, and that Gerdon's claims either have been or will be

adjudicated in separate post-conviction proceedings. (R., pp.304-08.) Gerdon filed a motion to reconsider on October 18, 2011 and the court denied that motion on October 19, 2011. (R., pp.310-13.) On November 14, 2011, Gerdon filed a motion to withdraw his guilty plea. (R., pp.315-17.) The court denied this motion on November 18, 2011. (R., p.367.)

Gerdon filed notices of appeal on November 14, 2011 and December 16, 2011. (R., pp.334-37, 372-73.)

ISSUES

Gerdon states the issues on appeal as:

Did the district court err when it denied Mr. Gerdon's "amended motion to vacate" and his motion to withdraw his guilty plea?

(Appellant's brief, p.4.)

The state rephrases the issues on appeal as:

1. Is this Court without jurisdiction to consider Gerdon's challenge to the order denying the amended motion to vacate because Gerdon did not file a timely appeal for the denial of that motion?
2. Has Gerdon failed to show that the district court erred in the denial of his amended motion to vacate and motion to withdraw his guilty plea because the district court correctly decided that the motions were untimely and that the district court lacked jurisdiction?

ARGUMENT

I.

This Court Is Without Jurisdiction To Consider Gerdon's Challenge To The Order Denying The Amended Motion To Vacate Because Gerdon Did Not File A Timely Appeal For The Denial Of That Motion

A. Introduction

Gerdon's "Amended motion [sic] to vacate" was denied on September 30, 2011. (R., pp.268, 304.) Gerdon did not file an appeal until November 14, 2011. (R., p.334.) This Court is without jurisdiction to consider Gerdon's challenge because his appeal was filed more than forty-two days after the order he challenged on appeal was filed.

B. Standard Of Review

"A question of jurisdiction is fundamental; it cannot be ignored when brought to [the appellate courts'] attention and should be addressed prior to considering the merits of an appeal." State v. Kavajecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003) (quoting H & V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors, 113 Idaho 646, 648, 747 P.2d 55, 57 (1987)). Whether a court has jurisdiction is a question of law, given free review. Kavajecz, 139 Idaho at 483, 80 P.3d at 1084.

C. Because Gerdon's Appeal Is Untimely, This Court Lacks Jurisdiction To Consider The Claims

Rule 14 of the Idaho Appellate Rules states in part:

Any appeal as a matter of right from the district court may be made only by physically filing a notice of appeal with the clerk of the district court within 42 days from the date evidenced by the filing stamp of the clerk of the court on any judgment or order of the district court appealable as a matter of right in any civil or criminal action. ... The time for an appeal from any criminal judgment, order or sentence in an action is terminated by the filing of a motion

within fourteen (14) days of the entry of the judgment which, if granted, could affect the judgment, order or sentence in the action, in which case the appeal period for the judgment and sentence commences to run upon the date of the clerk's filing stamp on the order deciding such motion.

I.A.R. 14. Where a defendant has failed to timely appeal an order of the district court, this Court does "not have jurisdiction to entertain a direct challenge to that order." State v. Roberts, 126 Idaho 920, 922, 894 P.2d 153, 155 (Ct. App. 1995).

Gerdon's appeal of the district court's denial of his motion to vacate is untimely because it was filed on November 14, 2011, more than forty-two days after the order was entered on September 30, 2011. (R., pp.268, 304, 334.) His motion to reconsider was filed on October 18, 2011, more than fourteen days from entry of the order denying the motion to vacate. (R., pp.310-13). Because Gerdon did not file a notice of appeal within 42 days of the entry of the order appealed from, and did not toll that time by filing his motion for reconsideration within 14 days, this Court is without jurisdiction to consider Gerdon's appeal challenging the district court's denial of his motion to vacate.

II.

Gerdon Has Failed To Show Error In The Denial Of His Amended Motion To Vacate And Motion To Withdraw His Guilty Plea Because The District Court Correctly Decided That The Motions Were Untimely And That The District Court Lacked Jurisdiction

A. Introduction

The district court denied Gerdon's amended motion to vacate and motion to withdraw his guilty plea when Gerdon filed the motions more than five years after his sentence became final. (R., pp.304-08, 367.) Notwithstanding the fact

that his motions are untimely, Gerdon asserts that the district court erred. (Appellant's brief p.3.) Gerdon's assertion is precluded by the Idaho Supreme Court's holding in State v. Jakoski, 139 Idaho 352, 79 P.3d 711 (2003).

B. Standard Of Review

Whether a court has jurisdiction is a question of law, given free review. Kavajecz, 139 Idaho at 483, 80 P.3d at 1084.

C. Because Gerdon's Motions Were Untimely And The District Court Lacked Jurisdiction, The District Court Did Not Err By Denying His Motions

"Absent a statute or rule extending its jurisdiction, the trial court's jurisdiction to amend or set aside a judgment expires once the judgment becomes final, either by expiration of the time for appeal or affirmance of the judgment on appeal." State v. Jakoski, 139 Idaho 352, 355, 79 P.3d 711, 714 (2003). With regards to motions to withdraw guilty pleas, the Idaho Supreme Court held:

Rule 33(c) of the Idaho Criminal Rules does not include any provision extending the jurisdiction of the trial court for the purpose of hearing a motion to withdraw a guilty plea. Jakoski was sentenced on December 12, 1994, and the judgment was entered on December 22, 1994. He did not appeal the judgment, and it therefore became final 42 days later. Thereafter, the district court no longer had jurisdiction to hear a motion to withdraw Jakoski's guilty plea [filed almost six years after the judgment was entered].

Id. See also State v. Peterson, 148 Idaho 610, 614, 226 P.3d 552, 556 (Ct. App. 2010) (holding that the trial court lacked jurisdiction to entertain motion to withdraw guilty plea because the judgment of conviction had become final upon Court of Appeal's issuance of a remittitur two months before defendant filed his motion).


Gerdon acknowledges Jakoski (Appellant's brief, p.4), but does not attempt to distinguish it, or otherwise argue that the district court's jurisdiction was somehow extended past the time Gerdon's judgment became final.

The district court's authority to consider any motion from Gerdon to withdraw his guilty pleas ended on July 5, 2005, when the Idaho Court of Appeals issued the remittitur in his direct appeal of his sentence. (R., p.204); Jakoski, 139 Idaho at 354-355, 79 P.3d at 713-714. More than five years later, Gerdon filed his amended motion to vacate and the I.C.R. 33(c) motion to withdraw his guilty pleas. (R., pp.268-69, 315-17.) Because the district court did not have jurisdiction to consider, grant, or deny any motion by Gerdon to vacate or withdraw his guilty pleas at that time, the district court's order denying his motions must be affirmed.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order denying Gerdon's amended motion to vacate and motion to withdraw his guilty pleas.

DATED this 5th day of June 2012.



KENNETH K. JORGENSEN
Deputy Attorney General


JEDEDIAH A. BIGELOW
Legal Intern

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of June 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JUSTIN M. CURTIS
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/pm