5-29-2013

State v. Moon Appellant's Brief Dckt. 40538

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MONTE C. MOON, Defendant-Appellant.	NO. 40538 BANNOCK COUNTY NO. CR 1996-367 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

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STATEMENT OF THE CASE

Nature of the Case

Monte Moon appeals from the district court's order denying his I.C.R. 35 (*hereinafter*, Rule 35) motion. That Rule 35 motion alleged that Mr. Moon's sentence was illegal since the district court lacked subject matter jurisdiction in regard to the charge of escape because Mr. Moon's actions did not constitute a crime under the statute as it then existed. However, the district court ruled that it did not have "jurisdiction" to hear that claim pursuant to Rule 35.[1] Mr. Moon contends that the district court's decision is directly contrary to the recent Idaho Supreme Court decision in *State v. Lute*, 150 Idaho 837 (2011), which expressly allows for the consideration of such claims raised in a Rule 35 motion alleging an illegal sentence. Therefore this Court should at least reverse the district court's decision and remand for the case further proceedings to consider the merits of Mr. Moon's claim.

However, Mr. Moon also asserts that the record is sufficiently developed for this Court, like the Court in *Lute*, to order relief for him on merits of the issues presented. The face of the record demonstrates that Mr. Moon's actions were not criminalized under the statute as it existed at that time. Therefore, this Court should remand this case with an instruction to vacate Mr. Moon's conviction for escape for lack of subject matter jurisdiction.

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[1] The district court appears to using the term "jurisdiction" in reference to whether it had the authority to take a certain action or grant a certain type of relief. *See, e.g., State v. Steelsmith*, 153 Idaho 577, 581 n.2 (2012) (recognizing that the term "jurisdiction," is often used in this manner, even though it is not entirely accurate to do so); *State v. Armstrong*, 146 Idaho 372, 375 (Ct. App. 2008) (same). Since the issue raised by Mr. Moon's Rule 35 motion is a true challenge to jurisdiction, it is important to distinguish between that issue and the issue of the district court's authority to grant the relief requested in the Rule 35 motion.

Statement of the Facts and Course of Proceedings

In 1996, Mr. Moon was initially charged with statutory rape. (R., p.34.) He was released on his own recognizance, but failed to appear for a subsequent hearing. (R., p.34.) The district court decided to allow Mr. Moon to continue with that release, but required him to wear an ankle monitor. (R., p.35.) The State subsequently charged him with escape pursuant to I.C. § 18-2505, alleging that "while charged with a felony and under house arrest, outside the walls of the Bannock County Jail, [he] did remove a home-monitor-device and escape." (R., p.35; Augmentation – Prosecuting Attorney's Information.) Mr. Moon subsequently pled guilty to the escape charge. (Augmentation – Minute Entry & Order filed Dec. 30, 1996.) He was sentenced to a unified term of five years, with three years fixed, running consecutively to his sentence for rape. (Augmentation – Minute Entry & Order, filed February 13, 1997.)

Recently, Mr. Moon filed a motion pursuant to Rule 35 alleging that his sentence is illegal because the district court did not have subject matter jurisdiction over the charge. (R., pp.1-2.) Specifically, he claimed that the acts alleged did not constitute a crime under the escape statute as it existed in 1996. (R., p.1.) He based his argument on the fact that I.C. § 18-2505 was amended in 2007 to clarify that it did, in fact, criminalize absconding during pretrial release when subject to an electronic monitoring device, provided that the defendant was given written notice of the criminality of such a potential penalty. (R., p.1.) As such, Mr. Moon contended that the statute did not cover such actions prior to the amendment, and so his acts in 1996 did not actually constitute a crime. (R., pp.1-2, 19.)

The district court, however, denied his motion, asserting that "This Court lacks jurisdiction over [Mr.] Moon's motion. . . . Nothing in Rule 35 allows a Court to overturn a

conviction." (R., p.36.) Mr. Moon filed a timely notice of appeal from that order. (R., pp.38-40.)

ISSUES

1. Whether the district court erroneously determined it was not authorized to consider Mr. Moon's claims when it was, in fact, required to do so, and so erroneously denied his Rule 35 motion.

2. Whether Mr. Moon's conviction for escape should be vacated because the district court did not have subject matter jurisdiction, since Mr. Moon's actions did not constitute a crime under the statute as it existed at that time.

ARGUMENT

I.

The District Court Erroneously Determined It Was Not Authorized To Consider Mr. Moon's Claims When It Was, In Fact, Required To Do So, And So Erroneously Denied His Rule 35 Motion

A. Introduction

The district court improperly determined that it did not have the authority under Rule 35 to consider Mr. Moon's claim. That decision is directly contrary to *Lute*, *supra*, wherein the Idaho Supreme Court explicitly allowed for claims challenging subject matter jurisdiction to be raised and addressed under Rule 35. Additionally, recent Idaho Supreme Court precedent requires the courts to consider claims that subject matter is lacking when those claims are brought to their attention, or even, to raise the issue *sua sponte* when the courts become aware of such a question. Therefore, the district court erred when it did not recognize its authority to act on Mr. Moon's claim that the district court lacked subject matter jurisdiction over the allegation of escape. This Court should reverse the district court's denial of Mr. Moon's Rule 35 motion and, at least, remand the case for a determination on the merits of Mr. Moon's claim.

B. Standard Of Review

Since the question of whether a statute grants authority to a district court is one of statutory construction, such questions are reviewed *de novo*. *See, e.g., State v. Hart*, 135 Idaho 827, 829 (2001). Whether or not a sentence is illegal or has been imposed in an illegal manner is also a question of law, over which this Court exercises free review. *Lute*, 150 Idaho at 839. Similarly, the question of whether jurisdiction existed is a question reviewed *de novo*. *Id.*

C. Rule 35 Is A Proper Mechanism By Which To Allege A Lack Of Subject Matter Jurisdiction, And The District Court Is Required To Consider Such Claims When Brought To Its Attention

The Idaho Supreme Court has recently held that "'[J]udgments and orders made without subject matter jurisdiction are void and 'are subject to collateral attack. . . .'" *Lute*, 150 Idaho at 840 (quoting *State v. Urrabazo*, 150 Idaho 158, 162-63 (2010) (quoting *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 626-27 (1978))). Such a challenge may properly be made to the district court via a motion to correct an illegal sentence pursuant to Rule 35. *Lute*, 150 Idaho at 840. In *Lute*, the defendant "filed a second I.C.R. 35 motion, arguing that his sentence was invalid because the crime he pled guilty to was not proscribed in the Idaho Code," and that the grand jury that issued the indictment against him did so while sitting beyond its rightful term. *Id.* at 839. Since motions pursuant to Rule 35 may be raised at any time, *see* I.C.R. 35(a), the Idaho Supreme Court held, "[W]here a court properly has jurisdiction to consider a case—*as it does here to consider [the defendant's] I.C.R. 35 motion*—and it is apparent that there is an issue concerning subject matter jurisdiction or that a defendant was convicted for something that is not a crime, this Court must correct that error." *Lute*, 150 Idaho at 840 (emphasis added). Therefore, such issues are properly raised in a motion pursuant to Rule 35.

Even though *Lute* speaks in terms of the appellate courts' ability to review the face of the record for subject matter jurisdiction, the Idaho Supreme Court has clarified the same authority exists with the district courts: "while this [C]ourt has jurisdiction, procedurally, to entertain an appeal, it has no greater jurisdiction of the subject matter or the merits than had the trial court. . . . The duty of this [C]ourt, upon reversing on such a case, would be to render such judgment *as the trial court should have rendered* it [sic],

which would be one dismissing the case." *State v. Mowrey*, 91 Idaho 693, 695 (1967) (quoting *Fortier v. Fortier*, 162 P.2d 438, 439 (Wash. 1945)) (emphasis added). Therefore, since the appellate courts have the authority to vacate a conviction for lack of subject matter jurisdiction pursuant to a Rule 35 motion alleging an illegal sentence, *Lute*, 150 Idaho at 841, the district courts also necessarily have such authority. *Mowrey*, 91 Idaho at 695. As such, the district court's conclusion that it was not authorized to consider Mr. Moon's motion is revealed to be erroneous.

Furthermore, the question of whether there was subject matter jurisdiction underlying a criminal charge is always a viable issue. *See, e.g., State v. Olin*, 153 Idaho 891, 893 (Ct. App. 2012) (holding that the ability to challenge the information as being "jurisdictionally deficient is never waived"). In fact, if the district court becomes aware of a potential defect in jurisdiction, it is obligated to raise and consider that issue *sua sponte*; such errors "*cannot* be ignored when brought to our attention. . . ." *State v. Kavajecz*, 139 Idaho 482, 483 (2003) (emphasis added); *see also Mowrey*, 91 Idaho at 695 (quoting *Hopkins v. Barnhardt*, 27 S.E.2d 644, 645 (N.C. 1943) ("When there is a defect of jurisdiction, or the complaint fails to state a cause of action, that is a defect upon the face of the record proper . . . and when such defects appear the Court will *ex mero motu* dismiss the action."). A challenge asserting no subject matter jurisdiction may also be raised for the first time on appeal. *See, e.g., Lute*, 150 Idaho at 840; *Armstrong*, 146 Idaho at 377. Therefore, not only was the district court authorized to consider Mr. Moon's claim that there was an absence of subject matter jurisdiction in regard to the escape charge, it was required to do so. *Kavajecz*, 139 Idaho at 843; *Mowrey*, 91 Idaho at 695; *Olin*, 153 Idaho at 893.

Idaho's courts have clarified when a jurisdictional defect exists: "(1) the alleged facts are not made criminal by the statute; (2) there is a failure to state facts essential to establish the offense charged; (3) the alleged facts show on their face that the court has no jurisdiction of the charged offense; or (4) the allegations fail to show that the offense charged was committed within the territorial jurisdiction of the court." *Olin*, 153 Idaho at 893; *State v. Izzard*, 136 Idaho 124, 127 (Ct. App. 2001). Mr. Moon's claim falls squarely within the first category of defects. (R., pp.1-2; *see also* R., p.19 ("Defendant has lodged a Criminal Rule 35 Motion before this Court whereby alleging that this Court lacked jurisdiction to imposed [sic] a sentence upon him for a criminal offense that was not a criminal offense as defined by any Idaho Statute during the time in which the alleged criminal offense was alleged to have been committed.") As such, his motion raised a viable claim that the district court could not refuse to address. *See, e.g., Lute*, 150 Idaho at 840; *Kavajecz*, 139 Idaho at 843; *Olin*, 153 Idaho at 893.

The district court attempted to justify its decision by relying on *Housely v. State*, 119 Idaho 885 (Ct. App. 1991), *State v. McDonald*, 130 Idaho 963 (Ct. App. 1997), and *State v. Self*, 139 Idaho 718 (Ct. App. 2003). (R., p.36.) Those cases do, indeed, state that Rule 35 is not the proper mechanism by which such claims should be raised. *See Housely*, 119 Idaho at 889; *McDonald*, 130 Idaho at 965; *Self*, 139 Idaho at 725; *see also State v. Burnright*, 132 Idaho 654, 657 n.1 (1999); *State v. Warren*, 135 Idaho 836, 841-42 (Ct. App. 2001). However, these cases are inconsistent with the Idaho Supreme Court's more recent holdings on the subject, which explicitly rejected the rationale from those cases: "[W]here a court properly has jurisdiction to consider a case—*as it does here to consider [the defendant's] I.C.R. 35 motion*—and it is apparent that there is an issue concerning subject matter jurisdiction or that a defendant was

convicted for something that is not a crime, this Court *must correct* that error." *Lute*, 150 Idaho at 840 (emphasis added). Furthermore, "the failure of an indictment to charge a crime *is a fundamental defect that can be raised at any time*." *Kavajecz*, 139 Idaho at 484 (quoting *State v. Byington*, 135 Idaho 621, 624 (Ct. App. 1993)) (emphasis added). Therefore, subsequent decisions have made it clear that the rationale in *Housely, et al.*, is no longer good law. Furthermore, when considering previous conflicts of precedent on this issue, the Court of Appeals made it clear that the most recent expression by the Idaho Supreme Court controls. *State v. Doe*, 139 Idaho 344, 347 (Ct. App. 2003). Currently, *Lute* is the Idaho Supreme Court's most recent pronouncement on this subject, and therefore, it controls. *See Doe*, 139 Idaho at 347.

As such, the district court's assertion that it was not authorized to consider Mr. Moon's claim that there was no subject matter jurisdiction underlying the original charge was erroneous. *See Lute*, 150 Idaho at 840; *Kavajecz*, 139 Idaho at 484. As a result, that decision should be reversed and the case remanded, at least for a determination on the merits of Mr. Moon's claims, if not for an order vacating the conviction entered without subject matter jurisdiction.

II.

Mr. Moon's Conviction For Escape Should Be Vacated Because The District Court Did Not Have Subject Matter Jurisdiction, Since Mr. Moon's Actions Did Not Constitute A Crime Under The Statute As It Existed At That Time

A. Introduction

When the lack of subject matter jurisdiction is clear from the record, this Court has the ability to grant the defendant relief by ordering the conviction based on such a charge to be vacated. In this case, the lack of subject matter jurisdiction is clear on the

record because the actions alleged in this case to be criminal were not criminal under the plain language of the statute. In fact, at the time Mr. Moon was charged, the statute did not extend to situations like Mr. Moon's, as evidenced by subsequent amendments to the statute. Therefore, because those actions were not criminalized under that statute, the document alleging those actions to violate that statute failed to confer subject matter jurisdiction on the district court to hear that case. As a result, this Court should order that the conviction for escape, for which there was no subject matter jurisdiction, should be vacated on remand.

B. The Conviction For Escape Should Be Vacated Because Of The Lack Of Subject Matter Jurisdiction

Idaho's appellate courts have made clear what is necessary in order for the district court to have subject matter jurisdiction over a criminal allegation: "'The information, indictment, or complaint alleging an offense was committed within the State of Idaho confers subject matter jurisdiction upon the court." *Lute*, 150 Idaho at 840 (quoting *State v. Rogers*, 140 Idaho 224, 228 (2004)). "[A] jurisdictional defect exists when: (1) the alleged facts are not made criminal by the statute; (2) there is a failure to state facts essential to establish the offense charged; (3) the alleged facts show on their face that the court has no jurisdiction of the charged offense; or (4) the allegations fail to show that the offense charged was committed w/in the territorial jurisdiction of the court." *Olin*, 153 Idaho at 893; *Izzard*, 136 Idaho at 127. Errors in this regard which are challenged via Rule 35(a) must be clear from the face of the record. *State v. McKinney*, 153 Idaho 837 (2012); *State v. Clements*, 148 Idaho 82, 86 (2009).

Furthermore, "[w]hen there is a defect of jurisdiction, or the complaint fails to state a cause of action, that is a defect upon the face of the record proper . . . and when such defects appear the Court will *ex mero motu* dismiss the action." *Mowrey*, 91 Idaho at 695 (quoting *Hopkins*, 27 S.E. 2d at 645). The face of the record in this case demonstrates that the alleged facts were not criminalized by the escape statute as it existed when Mr. Moon was alleged to have violated it, and therefore, subject matter jurisdiction was never conferred upon the district court.

In 1996, the escape statute provided:

> Every prisoner charged with, convicted of, or on probation for a felony who is confined in any jail or prison including the state penitentiary, or who while outside the walls of such jail or prison in the proper custody of any officer or person, or while in any factory, farm or other place without the walls of such jail or prison, who escapes or attempts to escape from such officer or person, or from such jail or prison, or from such factory, farm or other place without the walls of such jail or prison, shall be guilty of a felony, and upon conviction thereof, any such second term of imprisonment shall commence at the time he would otherwise have been discharged.

I.C. § 18-2505(1), 1995 Idaho Laws Ch. 74. That statute was amended in 2007, and the following definition of "escape" was added after the language quoted above:

> Escape includes the intentional act of leaving the area of restriction set forth in a court order admitting a person to bail or release on a person's own recognizance with electronic or global positioning system tracking, monitoring and detention . . . . A person may not be charged with the crime of escape for leaving the aforementioned area of restriction unless the person was notified in writing by the court at the time of setting of bail, release or sentencing of the consequences of violating this section by intentionally leaving the area of restriction.

I.C. § 18-2505(1), 2007 Idaho Laws Ch. 114. The express purpose of the 2007 amendment was "to clarify that persons on bail or sentencing orders that intentionally leave the area of restriction set forth by a court as part of a home detention, electronic monitoring, or global positioning tracking order, can be charged with the criminal offense of escape." 2007 Idaho Laws Ch. 114, Statement of Purpose. That clarification was

necessary because, under the plain language of the statute as it existed prior, a person in that particular situation could not violate the statute.

In *State v. Shanks*, 139 Idaho 152, 155 (Ct. App. 2003), the Court of Appeals engaged in an exercise of statutory construction over I.C. §18-2505(1), examining to which situations the statute applied. It held: "The third element of § 18-2505(1) encompasses prisoners who are: (a) confined in a correctional facility, or (b) in custody 'outside the walls of such correctional facility,' or (c) in a factory, farm or other place without walls of such correctional facility." *Shanks*, 139 Idaho at 155. The Court of Appeals concluded: "*If this element is satisfied whenever anyone convicted or charged with a felony is outside the walls of a correctional facility and in the custody of an officer or person, then the statute's disjunctive list of three separate location categories from which an escape may occur would be rendered superfluous.*" *Id.* (emphasis added). As such, the mere fact of being outside the prison and in the custody of another (*i.e.* released from a penal facility on one's own recognizance subjected to electronic monitoring by another), would not qualify as a situation from which that person could effect an escape as contemplated by the statute. *Id.* The Court of Appeals explained:

> This is so because the alternative circumstances of being in any correctional facility and being in custody outside the walls of a corrections facility exhaust all logical possibilities with regard to a correctional facility: one must either be inside or outside a correctional facility. If the legislature intended this breadth of coverage, it could have simply made the statute applicable to all prisoners charged with, convicted of, or on probation for a felony who are in the custody of an officer or other person. *To give the statute such a broad application in the face of the legislature's careful articulation of three alternative types of locations from which an escape may occur could violate a fundamental tenet of statutory interpretation that courts should strive "to give effect to [every] word, clause and sentence of a statute" so as not to render parts superfluous or without meaning.*

Id. (quoting *Univ. of Utah Hosp. & Med. Ctr. v. Bethke*, 101 Idaho 245, 248 (1980)) (emphasis added). The Court of Appeals then discussed the specific construction of the statute: "We find significant the legislature's use of the word, 'such,' in the phrase 'outside the walls of such correctional facility.' The adjective, 'such,' means 'Of that kind; of the same or like kind; identical with or similar to something specified or implied; . . . being the same as what has been mentioned or indicated . . . .' *Id.* (quoting *In re Hull*, 18 Idaho 475, 480 (1910)). Therefore, according to the Court of Appeals, it was significant that the situation of being outside the walls of a penal facility was listed alongside two situations designating situations where the person remained in the custody and control of the Department of Corrections (in a correctional facility (implying a walled penitentiary) or factory or farm without walls).

Applying that rationale, the person would have had to be in the direct custody and control of the Department of Correction , though not necessarily a prison, in order to effect an escape, and still give meaning to each of the three specified locations (a correctional facility, a factory or farm associated with a penal facility, or the custody of an approved agent outside the walls). *See* I.C. § 18-2505(1). The situation described by "outside the walls in the custody of an officer or person," when considered in light of the *Shanks* decision, is more akin to a work release scenario or to transport to and from the courthouse or between penal facilities. Essentially, it would apply to situations where the subject is required to stay in prison but is permitted to be outside the facility if he is with an approved agent of the Department (his work release supervisor or the officer overseeing the transport). *Compare State v. Rocque*, 104 Idaho 445, 446 (1983) (holding that a probationer with a voluntary agreement to be confined in jail at nights did not "escape" as contemplated in I.C. § 18-2505(1) when he did not return pursuant to

that agreement; at most, he had violated the terms of his probation). This interpretation of I.C. § 18-2505 is consistent with the overall scheme of the Idaho Code. *See, e.g. State v. Climer*, 127 Idaho 20, 24 (Ct. App. 1995) (holding that a defendant who, during the pretrial proceedings, was allowed to stay under house arrest subject to electronic monitoring, was not entitled to credit for that time against his ultimate sentence because of the freedoms he enjoyed in that situation).[2]

Applied to Mr. Moon's case, it is evident that he was not in any of the three locations from which he could effect an escape under the statute as it existed at that time. Since he was under house arrest (*see* Augmentation – Prosecuting Attorney's Information), he was not incarcerated at a correctional facility, he was not restricted to a farm or factory associated with a correctional facility, and he was not outside the walls as contemplated by the statute (as the Court of Appeals would subsequently explain in *Shanks*). *Compare Climer*, 127 Idaho at 24. Mr. Moon's situation was more akin to that in *Rocque*, where he was not required to return to the penal facility, and so could not commit the crime of escape; at most, he may have violated the terms of his pretrial release and been subject to having that privilege revoked. *Compare Rocque*, 104 Idaho at 446. His actions did not, however, constitute the separate offense of escape under the law as it existed at that time.

Therefore, since Mr. Moon's actions were not criminalized by the statute as it existed at that time, the charging document in that regard failed to confer subject matter jurisdiction for that alleged offense on the district court. *Olin*, 153 Idaho at 893; *Izzard*,

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[2] If the subject is not sufficiently in custody so as to accrue credit against a potential sentence, he would not be sufficiently in custody to effect an escape, as contemplated by I.C. § 18-2505(1), as it existed at that time. Hence the need for the Legislature to amend the statute to include such situations within the scope of I.C. § 18-2505(1).

136 Idaho at 127. As demonstrated *supra*, that error is clear from the face of the record; no additional fact finding is necessary. As such, this Court should not only reverse the district court's order denying the Rule 35 motion, but should also, as the Idaho Supreme Court did in *Lute*, remand this case "with instruction to vacate [the] conviction on the basis that no valid indictment or information was returned in the case and, as such, the district court never properly had jurisdiction to hear it." *Lute*, 150 Idaho at 841.

CONCLUSION

Mr. Moon respectfully requests that this Court reverse the district court's order denying his Rule 35 motion. He also respectfully requests this Court remand the case with instructions to vacate the conviction for escape for lack of subject matter jurisdiction. If this Court determines that there is insufficient evidence in the record to make that determination, Mr. Moon alternatively requests that this Court remand the case with instructions for the district court to consider the merits of his claims.

DATED this 29th day of May, 2013.

BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of May, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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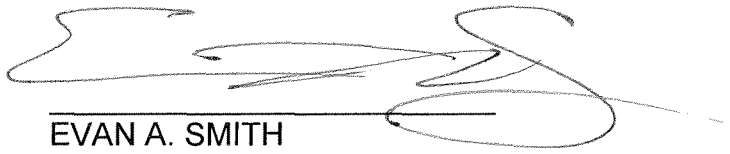

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