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State v. Friel Respondent's Brief Dckt. 42138

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	No. 42138
Plaintiff-Respondent,)	
)	Ada Co. Case No.
vs.)	CR-2001-70
)	
TIMOTHY FRIEL,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

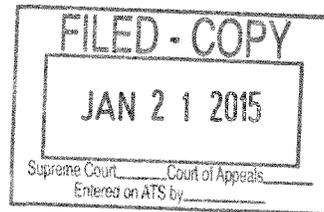
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STATEMENT OF THE CASE

Nature Of The Case

Timothy Lynn Friel appeals from the district court order denying Friel's motion to withdraw his probation violation admissions.

Statement Of The Facts And Course Of Proceedings

When he was 19 years old, Friel had sexual intercourse with 13-year-old J.C. (#40755 PSI, pp.179-180.¹) A grand jury indicted Friel for statutory rape. (#40755 R., pp.10-12.) Friel pled guilty and the district court imposed a unified sentence of eight years, with two years fixed, and retained jurisdiction. (#40755 R., pp.26-29.) Following the period of retained jurisdiction, the district court suspended Friel's sentence and placed him on supervised probation for eight years. (#40755 R., pp.35-40.)

On May 30, 2007, the state filed a motion for probation violation alleging that Friel had violated the conditions of his probation by leaving his assigned district without permission; violating his curfew; being charged with the new crimes of trespassing, using a telephone to harass, DUI, and two separate charges for failure to provide proof of insurance; failing to maintain full time employment or enroll as a full time student; consuming alcohol on seven separate occasions; frequenting an establishment where

¹ On May 13, 2014, this Court entered an Order Taking Judicial Notice of the Clerk's Record and Reporter's Transcript filed in appeal No. 40755, State v. Friel. The Presentence Investigation Report ("PSI") appears to be part of the Clerk's Record in that case, as it was included in the CD-R marked "Clerk's Record" provided to the parties by the Idaho Supreme Court in the appellate proceeding. (See #40755 R., p.301 (notice by Clerk of Court that PSI will "be submitted as a confidential exhibit to the Record").) PSI page numbers correspond with the page numbers of the electronic file "FrielPSI.pdf" in appeal No. 40755. Unless otherwise indicated, references to the record and transcript are to Idaho Supreme Court Case No. 42138.

alcohol is the main source of income; failing to pay the cost of supervision; failing to attend and/or complete sex offender treatment; violating his Sex Offender Contract by having access to the internet, having contact with a minor without supervision, and engaging in sexual contact without approval; and failing to “sign and/or return the address verification letter received by Idaho State Police giving his current address. (#40755 R., pp.65-68.) Friel admitted he had violated the conditions of his probation by committing the new crime of trespassing and by consuming alcohol on five separate occasions, and the state dismissed the remaining allegations. (#40755 R., pp.78-79.) The district court reinstated Friel on supervised probation, extending the term for a period of five years from the date of reinstatement. (#40755 R., pp.85-87.)

On May 1, 2012, the state filed a second motion for probation violation, alleging Friel had violated the conditions of his probation by failing to abide by the law “regarding an aggravated battery;” failing to report contact with law enforcement to his supervising officer; violating his Sexual Offender Agreement by engaging in sexual intercourse with a female without approval and failing a polygraph test with respect to the unapproved sexual contact; having unsupervised contact with a minor; failing to attend and/or complete sex offender treatment and being suspended from sex offender treatment “due to lack of progress;” committing the new crime of trespassing; and failing to pay restitution. (#40755 R., pp.165-168.) On July 2, 2012, Friel admitted he had violated the conditions of his probation by failing to complete sex offender treatment, and the state dismissed the remaining allegations. (#40755 R., pp.262-263.) On September 17, 2012, the district court entered an order revoking Friel’s probation, ordering his underlying sentence executed and retaining jurisdiction a second time. (#40755 R.,

pp.275-277.) Friel did not file an appeal from that order or otherwise claim that his admission to the probation violation was invalid.

Following Friel's second period of retained jurisdiction, on February 22, 2013, the district court relinquished jurisdiction. (#40755 R., pp.282-284.) Friel filed a notice of appeal timely from the district court's order relinquishing jurisdiction. (#40755 R., pp.285-288.) On June 4, 2014, the Idaho Court of Appeals affirmed the district court's order relinquishing jurisdiction and imposing Friel's underlying sentence. State v. Friel, Docket No. 40755, 2004 Unpublished Opinion No. 547 (Idaho App., June 4, 2014).

On March 7, 2013, while Friel's appeal was pending, he filed a timely Rule 35 motion for a reduction of sentence requesting leniency, which the district court denied. (#40755 R., pp.290-291; R., p.38-40.) Friel then filed a Rule 35 motion to correct an illegal sentence. (R., pp.41-48.) However, before any decision was rendered, his newly appointed counsel withdrew that motion. (R., pp.113-114.) On December 4, 2013, Friel's counsel filed a Motion to Withdraw Guilty Plea, seeking withdrawal of Friel's July 2, 2012 admission that he violated probation by failing to attend and/or successfully complete a sex offender treatment program. (R., pp.111-112, 115-122.) Friel contended his failure to complete such a program was not done willfully, as required by I.C.R. 33(e). After a hearing on March 21, 2014, the district court entered a Memorandum Decision and Order denying Friel's motion to withdraw his admission to the probation violation allegation. (R., pp.177-184; see generally 3/21/14 Tr.) Friel filed a notice of appeal. (R., pp.187-190.)

ISSUE

Friel states the issue on appeal as:

Did the district court abuse its discretion when it denied Mr. Friel's motion to withdraw his probation violation admission?

(Appellant's Brief, p.4.)

The state wishes to rephrase the issue on appeal as:

Did the district court lack jurisdiction to consider Friel's motion to withdraw his probation violation admission because it was filed after the judgment of conviction was final?

ARGUMENT

The District Court Lacked Jurisdiction To Consider Friel's Motion To Withdraw His Probation Violation Admission

Friel's assertion on appeal that the district court erred by denying his motion to withdraw his admission to a probation violation is barred because (1) the district court lacked jurisdiction to consider the motion because, at the time of the motion, jurisdiction had been transferred to the Idaho Board of Correction, and (2) Friel did not file a timely appeal from the order revoking probation that was the result of his admission.

Friel's counsel on appeal has candidly presented the operative law in regard to the two above-described barriers to the district court's and this Court's jurisdiction to consider the issue presented by Friel. (Appellant's Brief, pp.5-6.) The following legal analysis by the Idaho Court of Appeals in State v. Fleshman, 144 Idaho 772, 774-775, 171 P.3d 263, 265-266 (Ct. App. 2007), explains why the district court did not have jurisdiction to consider Friel's motion to withdraw his admission to the probation violation:

In the event that the trial court grants probation, it retains jurisdiction to revoke or modify the terms of probation. I.C. §§ 20–221; 20–222; *State v. Williams*, 126 Idaho 39, 44, 878 P.2d 213, 218 (Ct. App. 1994). If the trial court revokes probation and executes the imposed sentence, however, jurisdiction then transfers to the Board of Correction. *See Williams*, 126 Idaho at 44, 878 P.2d at 218; *see also State v. Done*, 139 Idaho 635, 638, 84 P.3d 571, 574 (Ct. App. 2003). Generally, once the sentence is executed by the physical transfer of the defendant to the custody of the Board of Correction, the trial court possesses no residual jurisdiction to alter the sentence or to reinstate probation, absent a Rule 35 motion. *See Williams*, 126 Idaho at 43–44, 878 P.2d at 217–18; *see also State v. Goodlett*, 139 Idaho 262, 265, 77 P.3d 487, 490 (Ct. App. 2003); *State v. Knutsen*, 138 Idaho 918, 921–22, 71 P.3d 1065, 1068–69 (Ct. App. 2003). Only I.C. § 19–2601(4) allows a trial court to retain jurisdiction, for 180 days, after the Board of Correction has physical custody of the defendant, within which time the trial court may suspend

further execution of the sentence and grant probation. See *id.* at 44, 878 P.2d at 218. Such is not the factual scenario here.

In the instant case, the district court revoked Fleshman's probation and executed his original sentence in 2004. The district court did not retain jurisdiction at that time. More than fifteen months later, Fleshman filed a motion seeking to withdraw his admission to the probation violations, which in essence sought to reverse the district court's order revoking his probation and executing sentence. However, when the district court revoked Fleshman's probation and executed his sentence, jurisdiction was transferred to the Board of Correction. At that point, the district court no longer had jurisdiction to consider Fleshman's motion to withdraw his admissions to the probation violations. Moreover, because Fleshman's motion did not seek to withdraw his original guilty plea in the underlying judgment of conviction, I.C.R. 33(c) is inapplicable.

In short, Fleshman attempted to withdraw his admissions to the probation violations, and reverse the consequent revocation of his probation, long after the district court transferred jurisdiction to the Board of Correction. Accordingly, because the district court did not have jurisdiction to grant Fleshman's motion, we affirm the district court's order denying Fleshman's motion to withdraw admissions of probation violations.

For the same reason the district court in Fleshman lacked jurisdiction to grant Fleshman's motion to withdraw his admissions to probation violations, the district court here lacked jurisdiction to consider Friel's identical motion -- it was filed December 4, 2013, over nine months after jurisdiction over Friel had been transferred to the Idaho Board of Correction. (See R., pp.111-112; #40755 R., pp.282-284); see also State v. Jakoski, 139 Idaho 352, 355, 79 P.3d 711, 714 (2003) ("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.").

Further, Friel failed to file a timely notice of appeal from the order that was generated by his admission to the probation violation. Friel admitted on July 2, 2012,

that he violated his probation by failing to complete sex offender treatment. (#40755 R., pp.262-263.) That admission resulted in the district court's September 17, 2012 order which revoked Friel's probation, executed his underlying sentence, and retained jurisdiction a second time. (#40755 R., pp.275-277.) As Friel accurately states on appeal:

. . . [T]he district court had no jurisdiction over the order revoking probation at the time Mr. Friel moved to withdraw his probation violation admissions, because Mr. Friel did not file an appeal from the order revoking probation. The order revoking Mr. Friel's probation was filed on September 17, 2012 (40755 R., pp.275-277), [and] that order became final on October 29, 2012, which was forty-two days from the entry of the order revoking probation. I.A.R. 14(a). Mr. Friel's motion to withdraw his probation violation was filed on December 4, 2013 (R., pp.111-112), which was over a year after the district court lost jurisdiction over the order revoking probation.

(Appellant's Brief, p.5 n.4.)

Because Friel was held in custody under the jurisdiction of the Idaho Board of Correction at the time he filed his motion to withdraw his admission to the probation violation, and because he failed to file a timely appeal from the September 17, 2012 order reflecting that admission, the district court lacked jurisdiction to consider Friel's motion, and he is precluded from having this Court consider his argument on appeal.

Conclusion

The state respectfully requests this Court to affirm the district court's order relinquishing jurisdiction and ordering Friel's sentence executed without reduction.

DATED this 21st day of January, 2015.

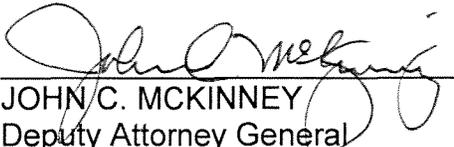

JOHN C. MCKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of January, 2015, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

SHAWN F. WILKERSON
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.


JOHN C. MCKINNEY
Deputy Attorney General

JCM/pm