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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 vs.)
)
 ROBERT E. PETERSON,)
)
 Defendant-Appellant.)

NO. 35441

FILED - COPY
AUG 3 2009
Supreme Court _____ Court of Appeals _____
Entered on ATS by: _____

BRIEF OF RESPONDENT

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

**HONORABLE PETER D. McDERMOTT and DON L. HARDING
District Judges**

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STATEMENT OF THE CASE

Nature Of The Case

Robert E. Peterson appeals from the judgment of conviction and sentences of two fixed plus three indeterminate on each count, to run consecutively, imposed upon his entry of guilty pleas to four counts of possession of sexually exploitative material for other than a commercial purpose.

Statement Of The Facts And Course Of The Proceedings

Peterson engaged in online conversations about having sex with who he believed to be a 13 year old girl. (#33848 R., p. 14¹.) During the online discussion, Peterson sent eight images to the purported 13 year old girl, including pictures of himself receiving oral sex and shots of underage girls engaged in sex acts. (#33848 R., p. 15.) The dialogue and transfer of pictures in fact took place with an undercover special agent with the Department of Homeland Security and led to search warrants and an investigation of Peterson by local law enforcement. (#33848 R., pp. 14-27.) Upon service of a search warrant, law enforcement seized a laptop computer and during a preliminary search of it found pictures of Peterson's genitals in addition to images of juvenile females engaged in sexual activity. (#33848 R., pp. 9-10.) Peterson admitted to having online conversations with people who purported to be females under the age of 18 as well as having videos of young girls, "probably ten or so," engaged in sexual activity with adult men said to be their fathers. (#33848 R., pp. 21-22.)

¹ The Court has taken judicial notice of the record from Docket No. 33848. (R., p. 1)

The state charged Peterson with ten counts of possession of sexually exploitative material. (#33848 R., pp. 63-66.) Pursuant to a plea agreement whereby the state would dismiss six counts and agree to concur with the sentencing recommendation of the presentence investigator and recommend concurrent sentences, Peterson pled guilty to four counts of the information. (#33848 R., pp. 69-74; 10/16/06 Tr., p. 7, L. 16 – p. 20, L. 8.) The district court imposed a sentence of three years fixed plus two years indeterminate, to run concurrently on the first two counts and three years fixed plus two years indeterminate, concurrent, on the second two counts with the second period of time to be served consecutively to the first. (#33848 R., pp. 76-77; 12/04/06 Tr., p. 61, L. 11 – p. 62, L. 19.) The end result of this sentence is an aggregate unified ten year sentence with the first six years fixed.

Peterson filed a Rule 35 motion to contest the sentence (R., pp. 2-3) and the district court denied the motion. (R., pp. 4-5). Peterson's sentence was affirmed on appeal. (State v. Peterson, Docket No. 33848 (November 16, 2007) (unpublished opinion).)

Peterson filed a *pro se* Rule 35 motion alleging ineffective assistance of counsel on November 19, 2007. (R., pp. 13-16.) The Court of Appeals issued a Remittitur, thereby making the judgment and sentence entered by the district court final on January 14, 2008. (Docket No. 33848.) After hearing argument on the Rule 35 motion, the district court granted the motion on March 18, 2008 and

reset the matter for a new sentencing in front of another judge.² (R., pp. 32-35, 41-44.) Peterson's motion to disqualify Judge Harding, the new sentencing judge, was denied (R., pp. 37-38, 39-40), as were his motions to reconsider and to withdraw his guilty plea (R., pp. 52; 73-76). The court re-sentenced Peterson to four consecutive sentences of two years fixed plus three years indeterminate. (R., pp. 73-76; 5/15/08 Tr. p. 56, Ls. 1-20.) Peterson timely appealed from the new judgment. (R., pp. 79-82.) Peterson's subsequent Rule 35 motion was denied. (R., pp. 77-78, 89.)

² The court initially ruled that "due to ineffective assistance of counsel the sentencing heretofore imposed is SET ASIDE." (R., p. 34.) The court then reconsidered the reasoning behind its decision and modify its order to reflect Peterson's sentence was set aside as a result of the court granting his motion as "a valid Rule 35 motion to correct an illegal sentence and not as a motion for post-conviction relief." (R., p. 44.)

ISSUES

Peterson states the issues on appeal as follows:

1. Did the court err in denying the motion to withdraw the guilty plea as the plea was not constitutionally valid and there was a just reason to grant the motion?
2. Did the court violate Mr. Peterson's state and federal constitutional rights to the assistance of counsel when it granted Mr. Peterson's *pro se* "motion" to disqualify Judge McDermott in the absence of counsel or a valid waiver of counsel?
3. Did the court err in denying the motion to disqualify Judge Harding without cause as the prior "motion" to disqualify Judge McDermott was not an I.C.R. 25(a) motion?
4. Did the court violate Mr. Peterson's due process rights under the state and federal constitutions by increasing his sentence after he was successful in his Rule 35 motion?

(Appellant's brief, p. 5)

The state rephrases the issues as follows:

1. Was the district court without jurisdiction to hear Peterson's post-judgment motions?
2. If reviewed, has Peterson failed to show his second sentence was imposed in a vindictive manner?

ARGUMENT

I.

The District Court Was Without Jurisdiction To Rule On Peterson's Post-Judgment Motions

A. Introduction

Following Peterson's sentencing by the district court, he filed a Rule 35 motion requesting reduction of his sentence. (R., pp. 2-3.) That motion was denied. (R., pp. 4-5.) Peterson appealed and his sentence was affirmed in an unpublished decision by the Court of Appeals. (State v. Peterson, Docket No. 33848 (November 16, 2007).) Peterson then filed a *pro se* motion for correction or reduction of his sentence pursuant to Rule 35 asserting that he had not been advised of his right against self-incrimination when submitting to a psycho-sexual evaluation pursuant to Estrada v. State, 143 Idaho 558, 149 P.3d 833 (S.Ct. 2006). (R., pp. 13-16.) Following argument on the motion, the district court granted Peterson's motion, set aside the sentence as per Peterson's request, and reset the matter for re-sentencing with another judge. (R., pp. 32-35, 41-44.)

The district court was without jurisdiction to consider Peterson's second Rule 35 motion because the motion did not raise any issues regarding illegality of the sentence.

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.

The question of whether the sentence imposed is illegal is one of law, subject to free review by the appellate court. State v. Hale, 116 Idaho 763, 779 P.2d 438 (Ct. App. 1989).

C. The District Court Did Not Have Jurisdiction To Consider Peterson’s Rule 35 Motion

Idaho Criminal Rule 35 governs the authority of the trial court to correct or modify a sentence and provides, in relevant part:

The court may correct an illegal sentence at any time and may correct a sentence that has been imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the filing of a judgment of conviction or within 120 days after the court releases retained jurisdiction.

...

Motions to correct or modify sentences under this rule must be filed within 120 days of the entry of the judgment imposing sentence or order releasing retained jurisdiction. . .

I.C.R. 35. Pursuant to this rule, a court may correct an illegal sentence at any time. I.C.R. 35; State v. Lee, 116 Idaho 515, 777 P.2d 737 (Ct. App. 1989). However, a claim that a sentence was imposed in an illegal manner must be brought within 120 days after the entry of judgment or order relinquishing jurisdiction. I.C.R. 35; State v. Alvarado, 132 Idaho 248, 249, 970 P.2d 516, 517 (Ct. App. 1998).

Peterson was sentenced on December 6, 2006, for four separate counts of possession of sexually exploitative material. (#33848 R., pp. 75-77.) His sentence of three years fixed plus two years indeterminate on counts 6 and 9, concurrent with each other but consecutive to the concurrent sentences on counts 2 and 5 of three years fixed plus two years indeterminate is within the maximum five years in prison allowable by the version of I.C. § 18-1507A in effect at the time of Peterson's plea.³ (#33848 R., pp. 75-77.) Almost one year later, Peterson filed a *pro se* motion pursuant to Rule 35. (R., pp. 13-16.) Peterson argued that his sentence was illegal because he was never advised of his right against self-incrimination as it related to his participation in a psycho-sexual evaluation. (R., pp. 13-16.)

"An illegal sentence under Rule 35 is one in excess of a statutory provision or otherwise contrary to applicable law." State v. Alsanea, 138 Idaho 733, 745, 69 P.3d 153, 165 (Ct. App. 2003) (citing State v. Lee, 116 Idaho 515, 516, 777 P.2d 737, 738 (Ct. App. 1989)). Peterson's sentence itself is within the

³ The statute has subsequently been amended to allow for imprisonment of up to ten years in the state prison. (I.C. § 18-1507A (Section 14 of S.L., ch. 178, appr. March 24, 2006.)

limits proscribed by law, so the argument is necessarily that the sentence was imposed in an illegal manner. As previously set forth, I.C.R. 35 requires a party seeking correction of a sentence imposed in an illegal manner to bring a motion for correction of sentence within 120 days of the entry of judgment or order relinquishing jurisdiction. The 120-day filing limitation of Rule 35 is a “jurisdictional limit on the authority of the court to consider the motion, and unless filed within the period, a district court lacks jurisdiction to grant any relief.” State v. Sutton, 113 Idaho 832, 833, 748 P.2d 416, 417 (Ct. App. 1987) (citations omitted).

Peterson asserts the state is prevented from arguing that the original sentence was not in fact illegal because that issue was not raised on a cross-appeal. (Appellant’s brief, p. 3, n. 1.) The state’s position, however, is that the district court was without subject matter jurisdiction to review the original judgment. Subject matter jurisdiction may be raised at any time in the proceedings. State v. Dietrich, 135 Idaho 870, 26 P.3d 53 (Ct. App. 2001); State v. Heyrend, 129 Idaho 568, 571, 929 P.2d 744, 747 (Ct. App. 1996)). Because the district court lacked jurisdiction to consider Peterson’s Rule 35 motion, his subsequent claims of error stemming from the improper granting of such motion are not properly before this Court.

D. The District Court Was Without Jurisdiction To Consider Peterson's Motion To Withdraw His Guilty Plea

Peterson asserts on appeal that the district court erred in denying his motion to withdraw his guilty plea because his plea was constitutionally invalid because he was never informed of the charges against him. (Appellant's brief, pp. 7-8.) This argument fails because the district court lacked jurisdiction to consider the motion.

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) (footnote omitted).

A motion to withdraw a guilty plea is governed by I.C.R. 33(c), which provides:

(c) Withdrawal of plea of guilty. A motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw defendant's plea.

(Emphasis in original.) "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, 139 Idaho at 355, 79 P.3d at 714.

Peterson was sentenced by the district court on December 6, 2006, upon his plea to four counts of possession of sexually exploitative material and his sentence was affirmed by the Court of Appeals. (#33848 R., pp. 69-70; State v. Peterson, Unpublished Opinion, Docket No. 33848 (November 16, 2007).) The judgment became final upon issuance of the remittitur. The motion to withdraw

the plea was filed months later. (R., p. 52.) Thus, the jurisdiction of the district court ended upon the original judgment becoming final. Because the motion to withdraw the plea was filed thereafter, the district court was without jurisdiction to consider it.

E. The District Court Was Without Jurisdiction To Consider Peterson's Request For Counsel At The Rule 35 Hearing

Peterson next argues the district court denied him the constitutional right to counsel at his Rule 35 motion and subsequent motion to disqualify the judge. (Appellant's brief, pp. 15-17.) Peterson's argument fails because the court was without jurisdiction to consider the underlying Rule 35 motion. Peterson did not have the right to be represented by counsel at a hearing the court was without jurisdiction to hear.

The Sixth Amendment guarantees a criminal defendant the right to counsel during all "critical stages" of the adversarial proceedings against him. Estrada v. State, 143 Idaho 558, 562, 149 P.3d 833, 837 (S.Ct. 2006) (citing United States v. Wade, 388 U.S. 218, 224 (1967); State v. Ruth, 102 Idaho 638, 637 P.2d 415 (1981)). Although this right encompasses the first direct appeal, it does not extend to post-conviction proceedings. Lawrence v. Florida, 549 U.S. 327, 336-37 (2007); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). "The determination whether [a] hearing is a 'critical stage' requiring the provision of counsel depends . . . upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the * * * confrontation and the ability of counsel to

help avoid that prejudice.” Coleman v. Alabama, 399 U.S. 1, 9 (1970) (quoting United States v. Wade, 388 U.S. 218, 227 (1967)).

There is no constitutional right to counsel during a Rule 35 proceeding, only a statutory right. See State v. Wade, 125 Idaho 522, 525, 873 P.2d 167, 169 (Ct. App. 1994). A criminal defendant in Idaho is entitled to counsel at all stages of a criminal case unless the court determines that the proceeding is not one “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); see Wade, 125 Idaho at 525, 873 P.2d at 169 (Ct. App. 1994). Because the district court lacked jurisdiction, the Rule 35 motion was not part of the criminal proceedings. Therefore no right to counsel attached.

F. The Court Did Not Have Jurisdiction To Consider Peterson’s Motion To Disqualify A Judge Pursuant To Rule 25

Peterson asserts the court erred in denying the motion to disqualify Judge McDermott Harding on the basis that Peterson had previously moved to disqualify Judge. (Appellant’s brief, pp. 18-19.) As detailed above, however, the district court was without jurisdiction to consider the motion.

II.

If Reviewed, Peterson’s Second Sentence Was Not Imposed In A Vindictive Manner

Finally, it is Peterson’s position that the higher sentence imposed by Judge Harding was vindictive and without justification by the court. (Appellant’s brief, pp. 18-19.) As stated above, the district court was without jurisdiction to consider Peterson’s Rule 35 motion and all subsequent motions; as such this

issue is not properly before this Court on appeal. However, if the question is addressed, it has not been shown that Judge Harding imposed a more severe sentence as a punishment to Peterson because he was successful in his Rule 35 motion in front of Judge McDermott.

A court violates a defendant's constitutional due process rights when it imposes a heavier sentence "if the motivation for the heavier sentence was to penalize the defendant" for exercising his rights. State v. Clark, 136 Idaho 529, 531, 37 P.3d 26, 28 (Ct. App. 2001) (citing North Carolina v. Pearce, 395 U.S. 711, 725-26 (1969), rev'd. in part Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201 (1989)). Where the sentence is harsher, there is generally a "presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." Clark, 136 Idaho at 531, 37 P.3d at 28 (quoting United States v. Goodwin, 457 U.S. 368, 374 (1982)).

When Peterson appeared before Judge Harding for sentencing on four counts of possession of sexually exploitative material, he did so with a newly prepared presentence report but without a psycho-sexual evaluation. The presentence report contained the official version of the crime, but Peterson opted not to give his version: "THE DEFENDANT, ROBERT PETERSON, INDICATED HE DID NOT DESIRE TO PROVIDE HIS VERSION OF THE CRIME AS HE HAD A MOTION TO WITHDRAW HIS PLEA OF GUILTY." (PSI, p. 3 (emphasis original)). As detailed in the presentence report, Peterson refused to discuss the crimes he had previously pled guilty to and no longer took responsibility for his actions. (PSI, pp. 12-13.) Judge Harding considered the proper criteria in

sentencing Peterson. (05/15/08 Tr., p. 54, L. 14 – p. 55, L. 25.) When imposing sentence, he looked heavily at the protection of society:

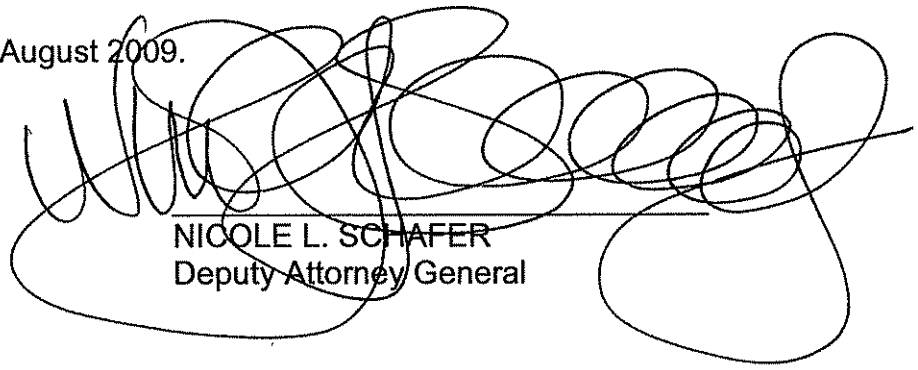
I am going to sentence you to two years fixed and three years indeterminate on each of those counts. And those are to run consecutive. I don't know whether what you tell me is true or not true, or whether you have found God or how much remorse you have, but I know that the activity that you were engaged in is so totally destructive and so harmful, and the use of those little children in making that kind of pornography and in storing it and in sending it around and having it on your something it on your computer is a great cancer in our society. You are an intelligent man, Mr. Peterson. There is no doubt, you are an intelligent man, but the path that you have undertaken is so harmful to society and little children that the Court feels that I need to give you this sentence in regard to that.

(05/15/08 Tr., p. 56, Ls. 1-14.) Judge Harding had an entirely different body of information before him than did Judge McDermott, upon Peterson's request. Peterson did not want a psycho-sexual evaluation nor did he want to give details of his offenses or accept responsibility for them at the time his presentence evaluation was prepared. Judge Harding's sentence was not a punishment for a successful Rule 35 motion; the record supports the fact that the sentence was punishment for the four counts of possession of sexually exploitative material to which Peterson pled guilty.

CONCLUSION

The state respectfully requests that this Court uphold Peterson's convictions, set aside the district court's ruling on Peterson's first Rule 35 motion as well as all subsequent motions and sentences and re-instate the sentence imposed by Judge McDermott on December 6, 2006.

DATED this day 31st day of August 2009.

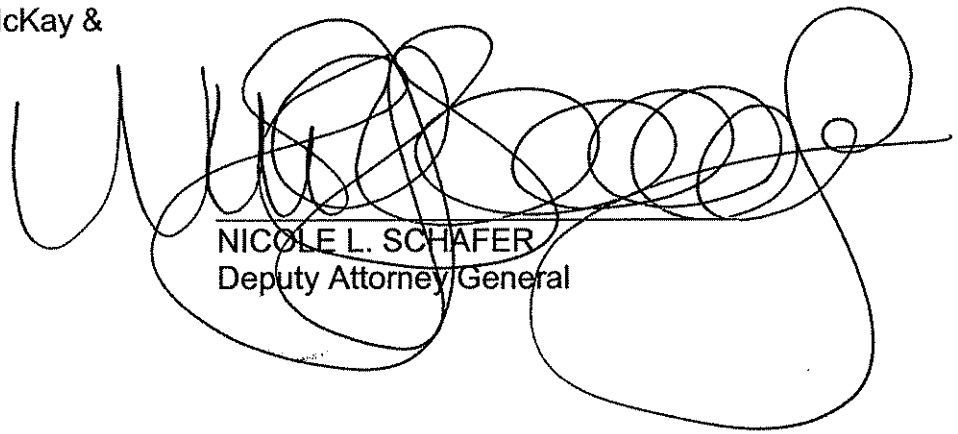


NICOLE L. SCHAFER
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31st day of August 2009, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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NICOLE L. SCHAFER
Deputy Attorney General

NLS/pm