12-24-2015

State v. Smith Appellant's Brief Dckt. 42962

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. DANA LYDELL SMITH, Defendant-Appellant.	)	Docket Nos. 42962 & 42963 (Minidoka Co. CR-2004-2628)

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fifth
Judicial District of the State of Idaho
In and For the County of Minidoka

HONORABLE RANDY J. STOKER
District Judge

Dennis Benjamin
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for Appellant

IDAHO ATTORNEY GENERAL
Criminal Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

II. STATEMENT OF THE CASE

A. *Nature of the Case*

This is a consolidated appeal from the district court's order denying Dana Smith's Motion for Correction or Reduction of Sentence (No. 42962-2015) and from the order denying his Motion for a New Trial (No. 42963-2015). R 75. The district court erred in denying Mr. Smith's Rule 35(a) motion because the illegality of the sentence is apparent on the face of the record. Alternatively, the trial court erred because it denied the motion without ruling on the motion for appointment of counsel.

B. *Procedural History and Statement of Facts*

1. Prior proceedings

In 2007, Dana Smith was convicted of grand theft after a jury trial. The district court imposed a unified sentence of fourteen years with seven years determinate. The judgment of conviction and sentence were affirmed on appeal. *State v. Smith*, Docket Nos. 35216/35604 (Ct. App. 2009) (unpublished). Mr. Smith filed a motion for a *Faretta*[1] hearing and motion to alter or amend judgment. The district court denied both motions and affirmed on appeal. *State v. Smith*, No. 38197 (Ct. App. 2011) (unpublished).

In 2012, Mr. Smith filed a *pro se* motion for a new trial. The district court denied the motion as untimely. On appeal, Mr. Smith contended that the trial court

---

[1] *Faretta v. California*, 422 U.S. 806 (1975).

should have extended the time limit for the filing of his motion under I.C. § 19-2407, which provides that the "application for a new trial may be made before or after judgment; and must be made within the time provided by the Idaho criminal rules unless the court or judge extends the time." The Court of Appeals disagreed, holding that "by terms of Rules 34 and 45, the time within which to file a motion for a new trial on the ground of newly discovered evidence may not be enlarged." *State v. Smith*, 154 Idaho 581, 582, 300 P.3d 1069, 1070 (Ct. App. 2013), *review denied* (2013).

Mr. Smith filed another motion for a new trial and argued that I.C.R. 34 was unconstitutional as applied in his case. The Court refused to address the constitutional argument because:

> This argument could have been raised in his sixth motion for a new trial, but Smith failed to raise it at that time. Therefore, Smith is precluded from raising this claim as he already raised the [substantive] claim in his sixth motion for a new trial and this Court concluded that the district court properly denied the motion based on the lack of jurisdiction.

State v. Smith, No. 40947 (Ct. App. 2014) (unpublished), *cert. dismissed*, 135 S. Ct. 202 (2014). The substantive basis for the motion was also not reached by the Court of Appeals.

2. Motion for appointment of counsel and motion for a new trial

On January 16, 2015, Mr. Smith filed another motion for a new trial, a Rule 35 motion, and a motion for appointment of counsel. R 28, 32, 50. In the new trial motion, he argued that the court erred in a matter of law when it permitted Mr.

Smith to proceed to trial without first determining whether he was competent to stand trial. R 32.

Mr. Smith was correct in his factual assertion. The record from No. 35216 shows that Judge John Melanson ordered an I.C. § 18-211 competency evaluation. T (No. 35216) (April 10, 2007), pg. 52, ln. 1-9.[2] Richard V. Smith, Ph.D. did the evaluation and wrote:

> His ability to assist in his own defense presents a question, however. He can and does ramble off rather inappropriately, both in terms of content and style intermittently. In my view that likely seriously impairs his ability to work systematically with his attorney in a sustained fashion. That is, there are brief periods in which he appears to be very lucid and very much on target. However, as indicated, intermittently he gets off target, is fairly irrational, bizarre, and grandiose. In those regards, [i]t is my opinion that he cannot effectively and systematically work with his defense attorney in a sustained fashion.

Smith Report, pg. 8 (in PSI[3]). Dr. Smith went on to say:

> In my opinion this examinee does not need to be rehospitalized. He can in all likelihood be treated safely on an outpatient basis and should resume medications to stabilize his mood. That being the case, once those medications would become effective then he could in all likelihood proceed with the matters in court that he is currently facing.

Id. Dr. Smith believed that Mr. Smith was incompetent to stand trial because he could not assist his attorney in a rational manner, but that he could be returned to competency once he was stabilized on his medications.

---

[2] A motion for this Court to take judicial notice of its file in No. 35216 is filed contemporaneously herewith.

[3] The Amended Notice of Appeal asked that the PSI be forwarded to the Court as an Exhibit. R 82.

Dr. Smith's report was dated May 2, 2007. On June 4, 2007, Mr. Smith's attorney, Dennis Byington, told the Court, when Mr. Smith was not present, that Mr. Smith "had been found to be not competent in aiding in his own defense to a certain degree." T (No. 35216) (June 4, 2007) pg. 69, ln. 12 - pg. 70, ln. 7. He went on to tell the Court that Mr. Smith was on the "medication that they have prescribed" and asked that a trial date be set. *Id.* Thus, Mr. Smith is correct that he never had a competency hearing, nor was Mr. Smith's fitness to proceed "determined by the court," as required by I.C. § 18-212(1).[4]

The district court denied the motion for new trial as untimely. R 57-58. The court never ruled on the motion for appointment of counsel.

3. Rule 35 motion

On the same day he filed his motion for appointment of counsel and for a new trial, Mr. Smith also filed a *pro se* Motion for Correction or Reduction of Sentence. He argued that "[t]he sentence is illegal and should be changed" because he was tried, convicted and sentenced while mentally incompetent. R 51. He also argued that the court did not order a psychiatric exam pursuant to I.C. § 19-2522 and that

---

[4] Thus, the Court of Appeals previously misstated the record when it wrote that, "The record demonstrates that Smith did receive a psychiatric evaluation, as ordered by the district court, pursuant to I.C. § 18–211, and was found competent to proceed to trial once provided with medication." *State v. Smith*, No. 40947, 2014 WL 505140, at *4. In fact, the doctor found that Mr. Smith "could in all likelihood" be returned to competency with proper medication. As noted above, the trial court never held a hearing to determine whether Mr. Smith had been given the appropriate medications or whether he had actually returned to competency before commencing trial, so it cannot be said that he was "found competent" to proceed.

the court did not take his mental illness into consideration at sentencing. *Id.*

The district court denied the motion, writing that:

> A Rule 35(a) motion may be brought at any time, but may only be brought to correct a sentence that is illegal from the face of the record. Smith does not contend that his sentence was illegal from the face of the record; he wants to delve into the record, claiming that his sentence was imposed in an illegal manner. I.C.R 35(b) applies to sentences imposed in an illegal manner. Therefore, his motion falls under Rule 35(b) and not Rule 35(a). Rule 35(b) motions must be brought within 120 days of the filing of a judgment of conviction. Smith's judgment of conviction for CR-2004-2628 was filed on 03/31/08. Six years have now passed. Therefore, this motion is untimely and the defendant's motion is DENIED.

R 53-54.

Again, the court did not rule on the motion to appoint counsel prior to ruling on the Rule 35 motion.

A notice of appeal from the denial of the Rule 35 motion was timely filed, R 65, as was a notice of appeal from the order denying the motion for a new trial. R 69. An amended notice of appeal was also filed. R 81.

III. ISSUES PRESENTED FOR REVIEW

A. Is a sentence imposed upon a defendant who has been found to be incompetent to stand trial but never found to have been restored to competency an illegal sentence which can be corrected at any time under I.C.R. 35(a)?

B. Alternatively, did the court err in failing to rule on the motion for appointment of counsel in light of the meritorious Rule 35(a) motion?

IV. ARGUMENT

A. The district court erred in finding the Rule 35 motion to be brought under subsection (b) instead of (a) and consequently erred by denying the motion for being untimely.

1. Standard of review

Idaho Criminal Rule 35(a) provides, that "[t]he court may correct a sentence that is illegal from the face of the record at any time." The term "illegal sentence" is not defined, nor is the term "face of the record." In considering "the interpretation of a criminal rule, this Court exercises free review." *State v. Clements*, 148 Idaho 82, 84, 218 P.3d 1143, 1145 (2009), *quoting, State v. Castro*, 145 Idaho 173, 175, 177 P.3d 387, 389 (2008).

2. Argument

The sentence is illegal because it violates I.C. § 18-210. That statute provides that "[n]o person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, *sentenced or punished* for the commission of an offense so long as such incapacity endures." (Emphasis added.) This is not a claim that the sentence was imposed in an illegal manner, as found by the district court. Mr. Smith's motion, in relevant part, challenged the court's power to impose a sentence at all. It was, therefore, properly brought as a 35(a) motion to correct an illegal sentence.

Moreover, the illegality of the sentence is apparent from the face of the record. The "face of the record" requirement was first announced in *State v.*

Clements, *supra*, where the Court wrote:

> Therefore, the term "illegal sentence" under Rule 35 is narrowly interpreted as a sentence that is illegal from the face of the record, i.e., *does not involve significant questions of fact or require an evidentiary hearing*. . . . . Because an illegal sentence may be corrected at any time, the authority conferred by Rule 35 should be limited to uphold the finality of judgments. Rule 35 is not a vehicle designed to reexamine the facts underlying the case to determine whether a sentence is illegal; *rather, the rule only applies to a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law* or where new evidence tends to show that the original sentence was excessive.

State v. Clements, 148 Idaho at 86, 218 P.3d at 1147 (2009) (emphasis added). (Subsequent to *Clements*, the Court amended the Criminal Rule to conform to the caselaw.)

Mr. Smith's motion meets all of the *Clements* requirements. The record plainly shows that Mr. Smith was found to be incompetent and the trial court never found he had been restored to competency. Therefore, the court was barred by I.C. § 18-210 from sentencing him or otherwise punishing him. The absence of a hearing where Mr. Smith was found to have returned to competency is apparent from the face of the record. One did not occur.

This case is much different than *Clements*. There, the defendant claimed that a second firearm enhancement was illegal because the two substantive offenses "arose out of the same indivisible course of conduct." That determination, however, required "a significant factual finding that the court was only able to make after reviewing testimony from the preliminary hearing." Accordingly, Clement's

sentence was not illegal from the face of the record. *Compare also, State v. Wolfe*, 158 Idaho 55, 66, 343 P.3d 497, 508 (2015) (Rule 35(a) relief not available in case which "involve[d] very significant questions of fact that cannot be resolved from the face of the judgment: whether the victim was in fact Native American and whether the crime occurred on a reservation."); and *State v. Peterson*, 148 Idaho 610, 613, 226 P.3d 552, 555 (Ct. App. 2010) (claim of illegality based upon "assertion . . . that his attorney did not advise him of his Fifth Amendment right to decline participation in the psychosexual evaluation" could not be determined from face of record).

This case is more like *State v. McKinney*, 153 Idaho 837, 291 P.3d 1036, (2013). There, the district court correctly reached the merits of a double jeopardy claim raised in a Rule 35(a) motion because the issue could be "determined merely by examining the respective statutes defining those crimes" and from "the face of the record simply by reading the information charging each crime." *McKinney*, 153 Idaho at 841, 291 P.3d at 1040. Here, a review of the Register of Actions would show no competency hearing was ever held.

The district court erred when it concluded that " Smith does not contend that his sentence was illegal from the face of the record; he wants to delve into the record, claiming that his sentence was imposed in an illegal manner." R 53-54. While, the 35(b) portion of the motion may have required "delving into the record," the 35(a) portion did not.

In addition, Mr. Smith's case fits into that "narrow category of cases" which

may be addressed in a 35(a) motion. Mr. Smith was sentenced in violation of I.C. § 18-210. He was found to be incompetent to stand trial and was never found to have been restored to competency. Thus, the sentence "is simply not authorized by law" and therefore "illegal" under Rule 35(a). *Clements*, *supra.*

3. Conclusion

Mr. Smith's *pro se* motion raised a valid Rule 35(a) claim. Therefore, it was timely. The illegality was apparent from the face of the record. And, any sentence imposed on an incompetent person is simply not authorized by law, is illegal and may be corrected under Rule 35(a). The court erred in denying the motion and this Court should reverse the order and vacate the sentence.

B. *Alternatively, the district court erred in denying Mr. Smith's motion for appointment of counsel prior to ruling on the pending motions.*

Even if this Court is not yet convinced of the merits of the Rule 35(a) motion, or finds that the motion was not adequately raised in the *pro se* pleading, the order denying the motion should still be vacated and the case remanded because the court failed to rule on Mr. Smith's motion for appointment of counsel. A needy person has the right to be represented by counsel in any post-commitment proceeding that the needy person considers appropriate, "unless the court in which the proceeding is brought determines that it is not a proceeding 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 also State v. Wade*, 125 Idaho 522, 523–24, 873 P.2d 167, 168–69 (Ct. App. 1994). In reviewing the denial of a motion

for appointment of counsel in post conviction proceedings, the "Court will not set aside the trial court's findings of fact unless they are clearly erroneous. As to questions of law, th[e] Court exercises free review." *Brown v. State*, 135 Idaho 676, 678, 23 P.3d 138, 140 (2001).

Here, the district court never ruled on the motion for appointment of counsel. That was error. *Charboneau v. State,* 140 Idaho 789, 792-93, 102 P.3d 1108, 1111-12 (2004). In *Charboneau,* the court failed to rule on the request for appointment of counsel prior to deciding the substantive issues contained in the petition. The Supreme Court vacated the dismissal and remanded for further proceedings, writing that "the district judge should have first determined whether Charboneau was entitled to court-appointed counsel before denying the post-conviction relief on its merits," noting that "[t]he Court of Appeals has ruled that when a district court is presented with a request for appointed counsel, the court must address this request before ruling on the substantive issues in the case." *Charboneau v. State*, 140 Idaho at 792-93, 102 P.3d at 1111-12, *citing Fox v. State*, 129 Idaho 881, 934 P.2d 947 (Ct. App. 1997); *Ortiz v. State*, 124 Idaho 67, 856 P.2d 104 (Ct. App.1993); *Henderson v. State*, 123 Idaho 51, 844 P.2d 33 (Ct. App.1992).

Here, the court erred because it did not rule on the motion to appoint counsel prior to dismissing the substantive motions. In this case, the failure to rule ***on*** the motion to appoint counsel was not harmless because the Rule 35 motion was actually brought under both I.C.R. 35(a) and (b), so the portion brought under (a)

was timely.

In addition, the trial court could not have denied counsel by determining that the Rule 35(a) motion was frivolous.

> Idaho Code § 19–852(b)(3) sets forth the standard for determining whether or not a post-conviction proceeding is frivolous. It is frivolous if it is "not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." When applying that standard to pro se applications for appointment of counsel, the trial court should keep in mind that petitions and affidavits filed by a pro se petitioner will often be conclusory and incomplete. Although facts sufficient to state a claim may not be alleged because they do not exist, they also may not be alleged because the pro se petitioner simply does not know what are the essential elements of a claim.

Charboneau, 140 Idaho at 793, 102 P.3d at 1112 .

Applying the above standards to this case, it would have been error for the court to deny the motion for appointment of counsel. Mr. Smith's *pro se* motion raised a valid Rule 35(a) claim and was timely. The illegality was apparent from the face of the record and the sentence was not authorized by law.

Even if the Court does not grant the requested Rule 35(a) relief, it still must vacate the order denying the motion and remand with directions for the court to appoint counsel.

V. CONCLUSION

Mr. Smith respectfully requests that this Court reverse the district court and vacate the sentence as it is illegal.

DATED this 24th day of December, 2015.

Dennis Benjamin
Attorney for Dana Smith

CERTIFICATE OF SERVICE

I CERTIFY that on December 24, 2015, I caused two true and correct copies of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Idaho Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Dennis Benjamin

Dennis Benjamin