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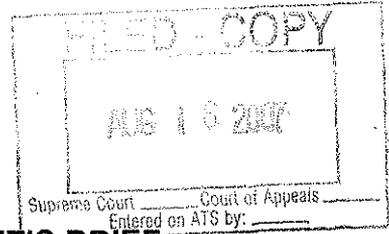
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Appellant-)
 Cross-Respondent)
)
 v.)
)
 MICHAEL EDWIN CLEMENTS,)
)
 Defendant-Respondent-)
 Cross-Appellant)
)

NO. 33481

RESPONDENT'S BRIEF



BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE

HONORABLE GREGORY S. ANDERSON
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STATEMENT OF THE CASE

Nature of the Case

The State appealed from the district court's order concluding that Mr. Clements' sentence was illegal. Mr. Clements appealed from the Judgment of Conviction Count II. Mr. Clements asserts that the district court had jurisdiction to decide whether his sentences were illegal. The only disagreements Mr. Clements has with the district court's rulings is that it erred when it failed to invalidate both sentences and failed to have a sentencing hearing on both counts. Because both sentences were void, the district court erred in failing to resentence Mr. Clements with being present at such a hearing.

Statement of the Facts and Course of Proceedings

In 1995, Mr. Clements and the State of Idaho entered into a Settlement Agreement to resolve the criminal charges pending against him. (R.22492, pp.238-241.) Mr. Clements agreed to plead guilty to the Amended Information Count I, Part 1 (Murder in the Second Degree); Count II, Part 2 (Enhancement for Use of a Deadly Weapon); Count II, Part 1 (Attempted Murder in the Second Degree); and Count II, Part 2 (Enhancement for Use of a Deadly Weapon). (R. 22492, pp.238-241.) There was no agreement between the parties as to what the sentences would be or what the State would recommend. (R. 22492, pp.238-241.)

On August 22, 1995, the district court imposed the sentences. (R. 22492, p.258.) On Count I, the district court imposed a unified life sentence plus a fifteen year enhancement, with fifteen years fixed. (R. 22492, pp.260-261.) On Count II, the district

court imposed a unified fifteen year sentence plus five years for the enhancement, with ten years fixed. (R. 22492, pp.262-263.) The two sentences were to run concurrent to each other. (R. 22492, pp.260-263.) The district court imposed multiple enhancements without any determination that the crimes arose from a divisible course of conduct. (R.22492, Tr.8/22/05, p.494, L.13-p.515, L.25.) After timely appealing, the Idaho Court of Appeals found that the district court did not abuse its discretion imposing the sentences upon Mr. Clements. *State v. Clements*, Unpublished Opinion No. 677, Docket No. 22492 (October 3, 1996).

Several years later, Mr. Clements filed a Motion Requesting Clarification. (R., pp.10-11.) Mr. Clements explained his confusion, asking the district court if he was required to serve the enhancement (Count I, part 2 – 15 years) before beginning serving the indeterminate time on the second degree murder charge (Count I, part 1). (R., pp.10-11.) The district court denied Mr. Clements' motion, finding the judgment unambiguous. (R., p.10.) Mr. Clements filed a Renewed Motion for Clarification. (R., pp.12-13.) Mr. Clements further explained that he believed that the district court may have imposed an illegal sentence upon him and he needed some additional information before filing the motion. (R., pp.12-13.) The district court denied the motion, finding the judgment unambiguous. (R., pp.12-13.)

Mr. Clements filed a Motion to Correct an Illegal Sentence. (R., pp.14-16.) Mr. Clements requested a new sentencing hearing because the district court imposed two enhancements for crimes which arose out of the same individual course of conduct. (R., pp.14-16.) Mr. Clements filed a Memorandum in Support of Motion to Correct an Illegal Sentence. (R., pp.17-20.) The State argued that the sentences were valid

because Mr. Clements' crimes arose out of a divisible course of conduct and under the plea agreement, Mr. Clements waived his challenge to the divisibility of the crimes. (R., p.26.)

After hearing argument, the district court found that the Mr. Clements' crimes constituted one course of conduct under the statute. (R., pp.34-47.) The district court further found that a defendant may never waive his right to challenge the legality of his sentence. (R., pp.34-47.) The district court specifically found, "the imposition of two enhancements was illegal." (R., p.41.) Finding that Mr. Clements' sentences were illegal, the district court held that it was only required to vacate one sentence. (R., pp.34-47.) The district court determined that once it declared one sentence illegal the other sentence automatically became legal. (R., pp.34-47.) The district court held that the entire attempted second degree murder sentence should be vacated, a new sentencing hearing conducted, and Mr. Clements should be present at the hearing. (R., pp.34-47.) The district court lodged an Order RE: Clements' Motion To Correct An Illegal Sentence reflecting its ruling to grant Mr. Clements' motion. (R., pp.48-49.) The State filed a Notice of Appeal. (R., pp.68-71.)

Mr. Clements filed an Objection, Notice of Error, Motion to Reconsider, and Amend or Alter Memorandum Decision RE: Clements Motion To Correct Illegal Sentence. (R., pp.54-59.) Mr. Clements argued that the district court committed plain error when it failed to vacate both of his sentences. (R., pp.54-59.) Mr. Clements asserted that the district court could not pick and choose which illegal sentence it wanted to vacate. (R., pp.54-59.) The district court denied Mr. Clements' motion

finding that Mr. Clements' motion to reconsider was an improper successive motion under the Idaho Criminal Rules. (R., pp.72-77.)

The district court conducted another sentencing hearing on Count II. (R., pp.83-85.) The district court imposed a fifteen year sentence, with ten years fixed, for Mr. Clements' conviction for attempted second degree murder. (R., pp.83-84.) Mr. Clements timely appealed from the Judgment of Conviction Count II. (R., pp.88-92.) The Idaho Supreme Court took judicial notice of the Reporter's Transcript and Clerk's Record filed in prior appeal No. 22492. (R., p.87.)

ISSUES

The State phrases the issue as follows:

- 1) Did the district court lack jurisdiction to re-examine the facts of the underlying crimes to which Clements pled guilty over ten years previously, to determine if Clements had a defense to one of the enhancements?

(Appellant's Brief, p.3.)

Cross-Appellant's Rephrasing of the Issue and Additional Issues On Appeal

- 1) Did the district court continue to have jurisdiction over the determination of an illegal sentence regardless that the determination of the question required a review of the underlying facts?
- 2) Did the district court err after finding that the imposition of the two enhancements was illegal and, therefore, the sentences were void, to invalidate only one sentence and to leave the other sentence valid?

ARGUMENT

I.

The District Court Continued To Have Jurisdiction To Decide Whether It Imposed An Illegal Sentence Upon Mr. Clements

A. Introduction

Mr. Clements asserts that the district court continues to have jurisdiction to evaluate whether an illegal sentence has been imposed. Determining whether Mr. Clements' sentences are illegal does require an evaluation of the underlying facts, but that does not undermine the court's authority to evaluate whether the sentences were illegal. The State has failed to support their argument with the appropriate record for review. However, existing record supports the district court's conclusion that Mr. Clements did not admit to the crimes arising out of divisible courses of conduct. The district court had jurisdiction to determine if the sentences were illegal even though the determination required review of the underlying facts.

B. Standard of Review

Whether a court lacks jurisdiction is a question of law which the appellate courts exercises free review. *State v. Shutz*, 143 Idaho 200, 202, 141 P.3d 1069, 1071 (2006).

C. The District Court Continued To Have Jurisdiction To Decide Whether It Imposed An Illegal Sentence Upon Mr. Clements

Mr. Clements asserts that the district court correctly found that he could not waive his right to be free from an illegal sentence. Because the district court never

loses jurisdiction to evaluate whether an illegal sentence has been imposed upon a defendant, the State's argument is in error.

The State argues that the district court lacked jurisdiction to determine if the underlying offenses were indivisible acts subject to only one enhancement. (Appellant's Brief, pp.4-6.) Recognizing that the district court maintains jurisdiction to correct an illegal sentence at any time, the State contends that by pleading guilty to both counts and both parts of each count, Mr. Clements waived, either implicitly or explicitly, any statutory defenses against the State's weapon enhancement charges. (Appellant's Brief, pp.4-6.) The State further argued that the application of the second weapons enhancement was illegal only if the crimes were indivisible as described in Idaho Code section 19-2520E. (Appellant's Brief, pp.4-6.) The State concluded its argument by contending that when Mr. Clements pled guilty, he waived any defenses that the crimes were indivisible acts subject to one enhancement. (Appellant's Brief, pp.4-6.)

The district court may correct an illegal sentence at any time. See I.C.R. 35; *State v. Rodriguez*, 119 Idaho 895, 896, 811 P.2d 505, 506 (Ct. App. 1991). "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, 3d 153, 165 App. 2003). Idaho Code section 19-2520E provides in part, "any person convicted of two (2) or more substantive crimes . . . which crimes arose out of the same indivisible course of conduct, may only be subject to one (1) enhanced penalty." I.C. § 19-2520E. Thus, any sentence imposed in excess of this statutory provision is an illegal sentence subject to correction pursuant to Rule 35.

In *State v. Custodio*, the Idaho Court of Appeals recognized that sentences may be illegal if enhancements were given to each sentence for convictions arising out of one indivisible course of conduct. *State v. Custodio*, 136 Idaho 197, 207-208, 30 P.3d 975, 985-986 (Ct. App. 2001.) In *Custodio*, a jury found Custodio guilty for voluntary manslaughter, involuntary manslaughter, aggravated batter, and burglary. *Id.* at 201, 30 P.3d at 979. Additionally, the jury found that Custodio used a deadly weapon in committing the first three offenses. *Id.* At sentencing the district court specifically found that the “three convictions related to a ‘distinct criminal act involving a different victim’” and, therefore, the crimes did not arise from the same indivisible course of conduct. *Id.* at 207, 30 P.3d at 985. The district court enhanced each of Custodio’s crimes pursuant to the weapons enhancement statute. *Id.*

In evaluating whether the provisions of Idaho Code section 19-2520E were violated when the district court imposed multiple weapons enhancements, the *Custodio* Court analyzed the underlying facts to determine the legality of the sentences. *Id.* at 208, 30 P.3d at 986. The *Custodio* Court disagreed with the district court’s findings that the convictions involved divisible courses of conduct. *Id.* In evaluating the facts, the Court noted that the shots fired by Custodio occurred during a relatively brief interval of time and the motivations for the crimes were the same. *Id.* Therefore, although the jury found Custodio guilty for voluntary manslaughter and a weapon enhancement, involuntary manslaughter and a weapon enhancement, and aggravated batter and a weapon enhancement, the district court could only legally impose one enhancement because the crimes were the result of one indivisible course of conduct. *See id.*

The Idaho Supreme Court has addressed Idaho Code section 19-2520E in a few cases. The Court's first opportunity to interpret Idaho Code section 19-2520E occurred in 1987, in *State v. Johns*, 112 Idaho 873, 881-882, 736 P.2d 1327, 1335-1336 (1987). The Court analyzed the interplay between Idaho Code section 19-2520, authorizing sentencing enhancements for use of a weapon, and Idaho Code section 19-2520E, prohibiting multiple enhancements for substantive crimes for crimes arising out of the same indivisible course of conduct. *Id.* at 881-82, 736 P.2d at 1336. Johns argued on appeal that the district court could not impose multiple enhancements because the robbery and murder took place on the same day, at the same time, and at the same place. *Id.* at 882, 736 P.2d at 1336. The district court concluded that the conduct concerning the murder was divisible from the conduct constituting the robbery and enhanced both sentences. *Id.* In order to evaluate the issue, the Idaho Supreme Court stated that the determination of whether the crimes arose out of divisible course of conduct is a factual question requiring the Court to review the record. *Id.* The Court concluded that the evidence in the record supported the district court's factual finding that the crimes arose out of a divisible course of conduct. *Id.*

In *State v. Searcy*, the district court recognized that it erroneously imposed multiple enhancements for convictions arising out of the same indivisible course of conduct. *State v. Searcy*, 118 Idaho 632, 637-638, 798 P.2d 914, 919-920 (1990). Searcy did not challenge the district court's finding that the crimes were an indivisible course of conduct, but instead that the district court failed to have him present when the district court corrected the illegal sentence. *Id.* The *Searcy* Court agreed and remanded the matter for a new sentencing hearing where Searcy could be present. *Id.*

In *State v. McLeskey*, the Idaho Supreme Court held that the district court erred in dismissing one of the multiple enhancements before trial upon the district court's reasoning that Idaho Code section 19-2520E prohibits multiple enhancements for the same indivisible course of conduct. *State v. McLeskey*, 138 Idaho 691, 696-697, 69 P.3d 111, 116-117 (2003). The *McLeskey* Court held that a person may be charged with multiple enhancements and may be found guilty at trial for multiple enhancements, but at sentencing the district court may only impose one enhanced penalty. *Id.* at 697, 69 P.3d at 117.

Similarly in the instant case, the State had authority to charge Mr. Clements with multiple enhancements. The State had authority to pursue guilty convictions either via trial or by plea to each one of the multiple enhancements. The agreement with the State that Mr. Clements pled guilty to second degree murder while using a firearm and to attempted second degree murder while using a firearm is no different than had the jury returned guilty verdicts for the two crimes and the two enhancements. The district court's responsibility remained the same - to impose a legal sentence. In order to have imposed a legal sentence, the district court must have correctly found whether the crimes involved arose out of the same indivisible course of conduct before imposing the enhancement. Mr. Clements' guilty plea, like a finding of guilty from a jury, did not change the district court's responsibility to impose only one enhancement under the facts of this case.

While evaluating whether the sentences are in excess of the statutory provisions of Idaho Code section 19-2520E does require review of the underlying facts, that does not deprive the court of jurisdiction to determine if the sentences are illegal. A legal

sentence must comply with the statutory provision against multiple enhancements for indivisible course of conduct and, therefore, a review of the underlying facts in this case was necessary. Because the district court continues to have jurisdiction to evaluate whether the sentence imposed is illegal, the district court had an obligation in this case to review the underlying facts and determine if the convictions were the result of one indivisible course of conduct.

D. The State Failed To Support Its Argument With An Adequate Record

Mr. Clements asserts that the State's argument that the district court lacked jurisdiction to determine if the crimes arose out of the same indivisible course of conduct because Mr. Clements either implicitly or explicitly agreed to the factual determination required by Idaho Code § 19-2520E is unsupported by the appellate record.

As the appellant, the State has a duty to furnish the appellate court with the transcripts necessary to review the issue presented by the State on appeal. *State v. Hayes*, 138 Idaho 761, 766, 69 P.3d 181, 186 (Ct. App. 2003). The appellate court will not presume errors in the absence of a transcript to evaluate the issue. *Id.* "[W]here pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court." *State v. Coma*, 133 Idaho 29, 34, 981 P.2d 754, 759 (Ct. App. 1999).

The State failed to provide this Court with the change of plea hearing transcript. Therefore, the change of plea transcript is presumed to support the district court's conclusion that Mr. Clements did not waive the prohibition against the district court imposing multiple enhancements for crimes arising out of the same indivisible course of conduct. The State failed to provide the appellate court with the necessary record to

review the claim that Mr. Clements waived his challenge to the prohibition against multiple enhancements for indivisible course of conduct.

E. Assuming This Court Reviews The Incomplete Record Because The State Has Raised A Jurisdictional Question, The Record Supports The District Court's Finding That No Waiver Of The Statutory Prohibition Against Multiple Enhancements For Crimes Arising Out Of The Same Indivisible Course Of Conduct Had Been Made By Mr. Clements

The State erroneously presumes without proof that Mr. Clements waived the prohibition against multiple enhancements and, therefore, the court lacked jurisdiction to evaluate the underlying facts when he challenged the legality of his sentences. The State assumes too much by the guilty pleas.

1) The Existing Appellate Record Supports The District Court's Finding That Mr. Clements Did Not Waive The Statutory Prohibition Against Multiple Enhancements For Crimes Arising Out Of The Same Indivisible Course Of Conduct

Mr. Clements asserts that the appellate record supports the district court's conclusion that Mr. Clements did not waive the prohibition against multiple enhancements for crimes arising out of the same indivisible course of conduct. Mr. Clements asserts that he never either implicitly or explicitly agreed that his crimes arose out of divisible courses of conduct.

As reflected in the Settlement Agreement Rule 11(d)(1)(A), Mr. Clements agreed to plead guilty to murder in the second degree and the enhancement for use of a firearm and he agreed to plead guilty to attempted second degree murder and the enhancement for use of a firearm. (R.22492, pp.238-241.) Also contained in the document is the parties' stipulation that there was no agreement as to what sentences the defendant would receive and that the State was free to make any sentencing

recommendation it deemed appropriate. (R.22492, pp.238-241.) Additionally, the document reflected that there were no other understandings between the parties outside of the written agreement. (R.22492, pp.238-241.)

The Change of Plea Minute Entry reflects that on May 12, 1995, Mr. Clements pled guilty. (R.22492, pp.234-236.) Specifically the minutes indicate, "the defendant entered a pleas of guilty to the charges of Murder in the Second Degree, Attempted Murder in the Second Degree with a Weapons Enhancement on each count." (R.22492, pp.234-236.) There is nothing in the minutes indicating that Mr. Clements stipulated that the crimes arose from divisible courses of conduct. (R.22492, pp.234-236.) As argued and incorporated herein by reference thereto in section I(C), the fact that Mr. Clements admitted to using a weapon to commit murder in the second degree and to commit attempted second degree murder does not resolve the factual question of whether the crimes arose from the same indivisible course of conduct. The State is allowed to pursue convictions for each part charged either be it through a trial or plea negotiations as explained in *McLeskey*. See *McLeskey*, 138 Idaho at 696-697, 69 P.3d at 116-117. The district court, however, may not impose multiple enhancements without making the additional inquiry about whether the crimes arose from a divisible course of conduct. See *id.*

At the sentencing hearing the district court made no findings that the crimes arose from a divisible course of conduct. After listening to two days of evidence, the district court imposed the sentences. (Record 22492, Tr. 8/22/1995, p.514, L.22-p.515, L.25.) The district court did find Mr. Clements guilty of the crimes of Murder in the Second Degree in Count I and Attempted Murder in Second Degree in Count II.

(R.22492, Tr. 8/22/1995, p.514, L.25-p.515, L.2.) The district court also found Mr. Clements guilty of having committed both of the crimes with the use of a deadly weapon – a firearm. (R.22492, Tr. 8/22/1995, p.515, Ls.3-6.) The district court never recognized the requirement that it had to find that the crimes arose from divisible course of conduct prior to imposing multiple enhancements.

There is nothing in the existing appellate record that demonstrates that Mr. Clements either implicitly or explicitly agreed that his crimes arose from a divisible course of conduct. As stated above, there was an agreement to plead guilty to murder in the second degree, attempted second degree murder, and to the use of a firearm during the commission of the crimes, however, that in of itself does not resolve the issue. Mr. Clements did not waive the statutory prohibition against multiple enhancements for crimes arising out of the same indivisible course of conduct. Therefore, because the district court had not previously resolved this issue, Mr. Clements may now assert that his sentences are illegal because the crimes arose from one divisible course of conduct.

II.

The District Court Erred Vacating Only One Of The Illegal Sentences

Mr. Clements agrees with the district court that his sentences were illegal because the district court imposed multiple enhancements for crimes arising out of the same indivisible course of conduct. Mr. Clements asserts, however, that the district court erred when it vacated only one of the sentences and not both.

Early in Idaho law, the Idaho Supreme Court recognized that illegal sentences are void. *Ex Parte Cox*, 3 Idaho 530, ___, 32 P. 197, 200 (1893). More recently, the

Idaho Court of Appeals noted that if the sentence has been determined to be void, no sentence is imposed until the district court corrects the judgment. *State v. Money*, 109 Idaho 757, 759, 710 P.2d 667, 669 (Ct. App. 1985). The judgment may not be corrected without the defendant's presence and the court resentencing the defendant. *Id.*

In this case, when the district court determined that the crimes arose out of one course of conduct, it invalidated both sentences, because both sentences were enhanced. The district court specifically held, "the imposition of the two enhancements was illegal." (R., p.41.) Without manipulation by the district court, both sentences were illegal and, therefore, void. Not voidable, but void. Mindful of *Custodio* where the Idaho Court of Appeals invalidated only two of the three illegal sentences for reasons unknown and remanded for resentencing only two of the three sentences, Mr. Clements asserts that the district court had no option but to resentence him on both counts because both sentences were void. See *State v. Custodio*, 136 Idaho 197, 208, 30 P.3d 975, 986 (Ct. App. 2001).

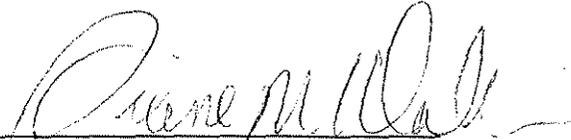
In this case both sentences were void and, therefore, the district court was required to resentence Mr. Clements on both counts. The district court could not simply choose to correct one sentence and leave the other sentence unchanged. Once the sentence is void, it remains void until Mr. Clements is resented. Vacating the other sentence and resentencing Mr. Clements does not convert the voided sentence to being valid. In essence the district court violated the prohibition about having the defendant present for sentencing when it declared the second degree murder sentence valid after invalidating the attempted second degree murder sentence. Neither sentence imposed

were valid, legal, or appropriate. Both sentences were void due to the illegality. As they both were illegal, Mr. Clements should have been given a hearing on both counts.

CONCLUSION

Mr. Clements asserts that the district court had jurisdiction to correct an illegal sentence. Neither Mr. Clements nor the State challenges the district court's determination that the crimes arose out of the same indivisible course of conduct. Therefore, because the district court violated the prohibition against multiple enhancements for crimes arising out of the same indivisible course of conduct, both sentences were illegal and, therefore, void. The district court could not choose which order to invalidate and was required to conduct a new sentencing hearing on both counts. Mr. Clements requests a new sentencing hearing on the second degree murder conviction as his original sentence imposed remains void until the court imposes a new sentence upon him.

DATED this 16th day of August, 2007.


DIANE M. WALKER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16th day of August, 2007, 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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