

8-18-2016

## State v. Hibbert Respondent's Brief Dckt. 44069

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 44069
Plaintiff-Respondent,	)	
	)	Minidoka County Case No.
v.	)	CR-1994-307
	)	
RICHARD J. HIBBERT,	)	
	)	RESPONDENT'S BRIEF
Defendant-Appellant.	)	
_____	)	

Issue

Has Hibbert failed to show error in the district court's denial of his Rule 35 motion for correction of an illegal sentence?

Hibbert Has Failed To Show Error In The District Court's Denial Of His Rule 35 Motion For Correction Of An Illegal Sentence

Hibbert pled guilty to lewd conduct with a minor child under the age of 16 and, on September 19, 1994, the district court imposed a determinate life sentence. (R., pp.3, 24, 46.) Hibbert appealed and, on July 7, 1995, the Idaho Court of Appeals affirmed

Hibbert's conviction and sentence, holding that Hibbert's fixed life sentence was not excessive. State v. Hibbert, 127 Idaho 277, 899 P.2d 987 (Ct. App. 1995).

Approximately 17 years later, on May 29, 2012, Hibbert filed a Rule 35 motion to correct an illegal sentence, directing the court to "look at" Blakely v. Washington, 542 U.S. 296 (2004), Apprendi v. New Jersey, 530 U.S. 466 (2000), and "the Sixth Amendment right to trial by jury," and asserting, *inter alia*, that his sentence was illegal because a jury did not find him guilty and he "could only get up to life not fixed life nor life without the possibility of parole." (R., p.4; Motion for Correction or Reduction of Sentence, ICR 35, file-stamped May 29, 2012, pp.2-3 (Augmentation).) The district court denied the motion, concluding:

[T]he Defendant's sentence is legal based on the face of the record. The maximum penalty for lewd conduct with a minor child under sixteen years of age is imprisonment in the state penitentiary for life. I.C. § 18-1508. The sentence the Defendant received was permitted by the applicable statute. Further, the Idaho Court of Appeals affirmed the Defendant's sentence on appeal. See State v. Hibbert, 127 Idaho 277, 899 P.2d 987 (Ct. App. 1995).

(R., p.4; Order Denying the Defendant's Motion for Appointment of Counsel, Motion for Hearing, and Motion for Correction or Reduction of Sentence, file-stamped June 1, 2012, pp.2-4 (Augmentation).) Hibbert appealed and, on February 19, 2013, the Idaho Court of Appeals affirmed the district court's order denying Hibbert's Rule 35 motion for correction of an illegal sentence, holding that Hibbert's sentence did not exceed the statutory maximum for lewd conduct with a minor under 16 and that it was not otherwise contrary to applicable law. State v. Hibbert, 2013 Unpublished Opinion No. 372, Docket No. 40088 (Idaho App., February 19, 2013).

On December 14, 2015, Hibbert filed a second Rule 35 motion for correction of an illegal sentence, again contending, *inter alia*, that his sentence was illegal under Blakely and Apprendi, and “under [his] Sixth Amendment rights to trial by jury,” and because he was sentenced to “fix[ed] life without parole which under Id[aho] law [he] could only get up to life in this case.” (R., pp.6-11.) The district court denied the motion on December 21, 2015, again concluding that Hibbert’s sentence was “legal from the face of the record” and was “permitted by the applicable statute,” and again noting that the Idaho Court of Appeals had already reviewed and affirmed Hibbert’s sentence on appeal. (R., pp.24-28.)

On February 5, 2016 – 46 days after the district court entered its order denying Hibbert’s second Rule 35 motion for correction of an illegal sentence, Hibbert filed a third Rule 35 motion for correction of an illegal sentence, once again reiterating his claims that his sentence was illegal under Blakely and Apprendi, that it “violate[d] [his] Sixth Amendment right,” and that “a life sentence is the most [he] can get under Id[aho] law for [his] crime, and [he] was given a sentence of fixed life without possibility of parole.” (R., pp.39-42.) The district court denied Hibbert’s third motion for correction of an illegal sentence, for the exact same reason that it had denied his second motion for correction of an illegal sentence. (R., pp.46-50; compare R., p.26 with R., p.48.) Hibbert filed a notice of appeal timely only from the district court’s order denying his third Rule 35 motion for correction of an illegal sentence. (R., pp.52-55.)

On appeal, mindful that State v. Stover, 140 Idaho 927, 104 P.3d 969 (2005), held that “*Blakely* and *Apprendi* do not impact on Idaho’s sentencing scheme,” that I.C. § 18-1508 authorizes imprisonment for a term of not more than life for lewd conduct,

and that State v. Cross, 132 Idaho 667, 978 P.2d 227 (1999), held that a fixed life sentence for a lewd conduct conviction is legal, Hibbert nevertheless asserts that the district court erred by denying his third Rule 35 motion for correction of an illegal sentence in light of his belief that his sentence was “an improperly-enhanced sentence” because “the maximum [he] could be sentence[d] to is life,’ but he was given a sentence of ‘fixed life without the possibility of parole.’” (Appellant’s brief, pp.2-3 (citing R., p.40).) Hibbert’s claim is barred by the doctrine of *res judicata*.

The doctrine of *res judicata* prevents re-litigation of issues that have been previously decided in a final judgment or decision in an action between the same litigants. State v. Rhoades, 134 Idaho 862, 863, 11 P.3d 481, 482 (2000). In Rhoades, the Idaho Supreme Court held that “the doctrine of *res judicata* can be applied to bar consideration of subsequent Rule 35 motions to the extent those motions attempt to relitigate issues already finally decided in earlier Rule 35 motions.” Id.

Hibbert raised the same claim in his third Rule 35 motion for correction of an illegal sentence that he did in the first two motions – that his sentence is illegal because he believes the maximum sentence for lewd conduct is “life” and not “fixed life without possibility of parole.” (R., pp.7-8, 40-41; Motion for Correction or Reduction of Sentence, ICR 35, filed May 29, 2012, pp.2-3 (Augmentation).) All three motions were denied for the same reasons – because Hibbert’s sentence is permitted by I.C. § 18-1508 and is legal from the face of the record. (R., pp.26-27, 48-49; Order Denying the Defendant’s Motion for Appointment of Counsel, Motion for Hearing, and Motion for Correction or Reduction of Sentence, filed June 1, 2012, pp.2-4 (Augmentation).) The Idaho Court of Appeals has already determined that Hibbert’s sentence was not

excessive, Hibbert, 127 Idaho 277, 899 P.2d 987, and, in State v. Hibbert, 2013 Unpublished Opinion No. 372, Docket No. 40088 (Idaho App., February 19, 2013) – a decision that became final in March 2013 – the Idaho Court of Appeals affirmed the district court’s determination that Hibbert’s sentence is not illegal. (R., p.4.)

Hibbert did not appeal from, or otherwise challenge, the district court’s December 21, 2015 order denying his second Rule 35 motion for correction of an illegal sentence and, as such, that order became final 42 days later, on February 1, 2016. (R., pp.4-5.) Hibbert’s third Rule 35 motion for correction of an illegal sentence, delivered to prison authorities for mailing on February 2, 2016 and filed on February 5, 2016, raised the same issues that had already been decided in final orders. (R., pp.4, 24-28, 39-42; Order Denying the Defendant’s Motion for Appointment of Counsel, Motion for Hearing, and Motion for Correction or Reduction of Sentence, filed June 1, 2012 (Augmentation); State v. Hibbert, 2013 Unpublished Opinion No. 372, Docket No. 40088 (Idaho App., February 19, 2013).) Because the decisions on Hibbert’s prior motions were final decisions, *res judicata* prohibits Hibbert’s attempt to relitigate the legality of his sentence based on a claim that the maximum sentence he could have received for lewd conduct is “life” and not “fixed life” “without possibility of parole.” (R., pp.40-41; Appellant’s brief, pp.2-3.) Therefore, Hibbert has failed to show any basis for reversal of the district court’s denial of his third Rule 35 motion for correction of an illegal sentence and the court’s order denying the motion should be affirmed.

Conclusion

The state respectfully requests this Court to affirm the district court's order denying Hibbert's third Rule 35 motion for correction of an illegal sentence.

DATED this 18th day of August, 2016.

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 18th day of August, 2016, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

BRIAN R. DICKSON  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

/s/ Lori A. Fleming  
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