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State v. Gould Respondent's Brief Dckt. 44493

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STATEMENT OF THE CASE

Nature Of The Case

Brandon Grant Gould appeals from his latest Rule 35 denial.

Statement Of The Facts And Course Of The Proceedings

A grand jury indicted Gould on one count of lewd conduct with a minor under the age of 16 and one count of sexual abuse of a child under the age of 16 years. (#35797 R., pp.16-17.) A petit jury found Gould guilty of lewd conduct with a minor under the age of 16, but was unable to reach a unanimous verdict on the sexual abuse charge. (#35797 R., pp.87-88.) The district court imposed a unified sentence of 10 years, with three years fixed. (#35797 R., pp.106-07.) Gould filed a notice of appeal timely from the judgment of conviction. (R., pp.109-11.) The Court of Appeals affirmed. State v. Gould, Docket No. 35797, 2009 Unpublished Opinion No. 653 (Idaho App., October 27, 2009).

On November 13, 2013, Gould filed a Rule 35 motion claiming his sentence was illegal because of alleged defects in the amended indictment. (#42051 R., pp.9-10.) The district court rejected Gould's arguments and denied his motion. (#42051 R., pp.25-27.) The Court of Appeals affirmed. State v. Gould, Docket No. 42051, 2015 Unpublished Opinion No. 394 (Idaho App., March 6, 2015).

Gould filed a second Rule 35 motion to correct an illegal sentence on February 29, 2015. (R., pp. 15-39.) Gould's claim was set forth by the district court as follows:

Gould argues the prosecutor engaged in misconduct by presenting the proposed Amended Indictment to the grand jury in lieu of the original proposed indictment. He says it was up to the grand jury to discern that the evidence presented was insufficient [to] support the original iteration of Count II, as set forth in the original proposed indictment, and then itself suggest a change to Count II. Thus, the alleged infirmity in the proceedings before the grand jury relates to Count II, of which Gould was acquitted at trial, not Count I, of which he was convicted at trial. He says he is nevertheless entitled to relief under Rule 35(a), as Count II's existence supposedly prejudiced him in his efforts at defending against Count I.

(R., pp. 52-53.) The district court denied the motion on several grounds, including that Gould had failed to “identify a tenable legal basis for concluding that the prosecutor engaged in misconduct by proposing to the grand jury, after the evidence was presented but before the grand jury had deliberated, a different form of indictment than the prosecutor originally contemplated,” that the alleged defect was not jurisdictional, and that the challenge did not relate to the legality of his sentence. (R., pp. 53-54.) The district court’s order was filed March 2, 2016. (R., p. 51.) Gould did not appeal from the denial of his second Rule 35 motion.

(See, generally, R.)

Gould filed a third Rule 35 motion. (R., pp. 56-77.)

This time, he argues that Count II was constructively amended during the course of trial, supposedly depriving the Court of subject-matter jurisdiction over the charges. The alleged constructive amendment of Count II happened in one or both of two ways: (i) by the supposed introduction at trial of evidence of different sexual touching (manual-to-genital touching) than was alleged in Count II (manual-to-bottom touching); and (ii) by the giving of jury instructions that did not require the jury to find manual-to-bottom touching to find Gould guilty as charged in Count II. As Gould acknowledges, though, he was acquitted of Count II. Thus, as he did in his second Rule 35(a) motion, he again is arguing that supposed improprieties with respect to Count II prejudiced him in defending against Count I, of which he was found guilty.

(R., pp. 79-80 (footnote omitted).) The district court denied the motion on July 25, 2016, both because the claim failed on the merits and because it was not properly raised under Rule 35. (R., pp. 78-81.¹)

Gould filed a motion for reconsideration signed on August 9, 2016, and filed on August 12, 2016. (R., pp. 83-88.) The district court denied the reconsideration motion, concluding that its order “adequately explains why Gould is not entitled to the relief he requests.” (R., pp. 89-90.) Gould filed a notice of appeal timely only from the denial of his motion for reconsideration. (R., pp. 92-93.)

¹ A copy of the district court’s order denying the third Rule 35 motion is attached to this brief and incorporated in full in the state’s alternative argument, below.

ISSUES

Gould states the issue on appeal as:

Did the district court err in denying Mr. Gould's motion for reconsideration?

(Appellant's brief, p. 4.)

The state rephrases the issues as:

1. Has Gould failed to show that this Court has appellate jurisdiction to consider the merits of his third Rule 35 motion?
2. If this Court has jurisdiction, has Gould failed to show error in the denial of his third Rule 35 motion?

ARGUMENT

I.

Gould Has Failed To Show That This Court Has Appellate Jurisdiction To Consider The Merits Of His Third Rule 35 Motion

A. Introduction

This Court lacks jurisdiction to consider the only claim of error raised on this appeal.

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.

C. This Court Lacks Jurisdiction To Review The Merits Of The District Court’s Order

An appeal from the district court “may be made only by physically filing a notice of appeal ... within 42 days.” I.A.R. 14(a). A timely filed notice of appeal is a prerequisite to appellate jurisdiction. I.A.R. 21; State v. Payan, 128 Idaho 866, 920 P.2d 82 (Ct. App. 1996); State v. Fuller, 104 Idaho 891, 665 P.2d 190 (Ct. App. 1983). The failure to file a notice of appeal within the time limits prescribed by the appellate rules requires “automatic dismissal” of the appeal. I.A.R. 21. Where an appellant has failed to timely appeal an order of the district

court, this Court does “not have jurisdiction to entertain a direct challenge to that order.” State v. Roberts, 126 Idaho 920, 922, 894 P.2d 153, 155 (Ct. App. 1995).

The order denying the third Rule 35 motion was filed July 25, 2016. (R., p. 78.) The notice of appeal was filed September 12, 2016 (R., p. 92), 50 days later. The appeal is not timely from that order.

A motion filed within 14 days of an appealable order may, under some circumstances, terminate the time for filing an appeal and start it anew upon resolution of the motion. I.A.R. 14(a). Gould filed a motion for reconsideration signed on August 9, 2016, and filed on August 12, 2016. (R., pp. 83-88.) These dates were, respectively, 15 and 18 days after entry of the order denying the third Rule 35 motion. Even assuming that such a motion would otherwise qualify to restart the 42 day period, it was not filed within 14 days of the original order.

On appeal Gould contends he is challenging only the denial of his motion to reconsider. However, all of his argument goes to the merits of his third Rule 35 motion. (Appellant’s brief, pp. 5-8.²) The Court lacks appellate jurisdiction to review the merits of the order denying the third Rule 35 motion, and therefore lacks jurisdiction to consider Gould’s arguments on appeal.

² Gould apparently contends that this Court has jurisdiction to review the original order because it has jurisdiction to review the denial of reconsideration and both are reviewed under the same standard of review. (Appellant’s brief, p. 5.) This is not correct. An untimely reconsideration motion does not grant jurisdiction to review the order being reconsidered. Dunlap v. Cassia Mem’l Hosp. Med. Ctr., 134 Idaho 233, 236, 999 P.2d 888, 891 (2000).

II.

Gould Has Failed To Show Error In The Denial Of His Third Rule 35 Motion

Gould, “[m]indful” of contrary authority, asserts that his claimed errors relating to Count II of the indictment render his sentence for his conviction on Count I illegal. (Appellant’s brief, pp. 5-8.) If this Court reaches the merits, it should affirm for the reasons stated in the district court’s order denying Gould’s third Rule 35 motion.

CONCLUSION

The state respectfully requests this Court to dismiss Gould’s appeal or, alternatively, affirm the denial of Gould’s third Rule 35 motion.

DATED this 17th day of March, 2017.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of March, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

REED P. ANDERSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd