4-2-2018

State v. Caude Appellant's Brief Dckt. 45440

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	**NO. 45440**
	)	
v.	)	**Twin Falls Co.**
	)	**CR-2008-11107**
PERRY WAYNE CADUE,	)	
	)	
Defendant-Appellant.	)	
	)	

APPELLANT'S BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

HONORABLE G. RICHARD BEVAN
Presiding District Judge

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STATEMENT OF THE CASE

Nature of the Case

Appellant Perry Cadue (hereinafter Appellant) appeals from an order denying his motion to correct illegal sentence.

Course of Proceedings

The proceedings were succinctly described in the district court's Order on I.C.R. 35(a) Motion for Correction of Illegal Sentence Denied Without a Hearing (hereinafter Order):

> Cadue was sentenced on November 24, 2009 for the crime of Aggravated Battery. Cadue was sentenced to a unified term of 15 years, with 10 years fixed and 5 years indeterminate, to serve. The conviction was affirmed on appeal on May 24, 2011. In addition, Cadue filed post-convictions petitions in 20121 and 20132.
>
> On January 4, 2010, Cadue filed a Motion for Correction or Reduction of Sentence pursuant to Idaho Criminal Rules (I.C.R.) 35(b). The Rule 35 Motion was denied without a hearing on February 16, 2010.
>
> Recognizing he is unable to file more than one Rule 35 motion for Correction or Reduction of sentence, Cadue has now filed a Rule 35 Motion for Correction of an Illegal Sentence pursuant to I.C.R. 35(a), which does not have the same limit as a motion to reduce sentence under I.C.R. 35(b).

FOOTNOTES

1 Cadue filed a post-conviction petition in CV-2012-839 on February 27, 2012. A judgment was entered dismissing the petition on July 23, 2012 and re-entered on September 6, 2012. The decision was affirmed on appeal on February 7, 2014.

2 Cadue filed a post-conviction petition in CV-2013-1072 on March 14, 2013. A judgment was entered dismissing

> the petition on April 12, 2013. The decision was affirmed on appeal on August 28, 2014.

Order, p. 2. (R. p. 83.)

The state filed a Motion for Order Denying Defendant's Motion for Correction of Illegal Sentence Without a Hearing. (R. p. 77-81.) The court then issued its Order on I.C.R. 35(a) Motion for Correction of Illegal Sentence Denied Without a Hearing. (R. p. 82-89.)

Appellant timely appeals. (R. p. 19, 109-111.)

ISSUE

WHETHER THE COURT ERRED BY DENYING THE MOTION TO CORRECT ILLEGAL SENTENCE

ARGUMENT

THE DISTRICT COURT ERRED BY DENYING THE MOTION TO CORRECT ILLEGAL SENTENCE

A. Standard of review

Whether a sentence is illegal is a question of law, over which an appellate court exercises free review. *State v. Farwell,* 144 Idaho 732, 735, 170 P.3d 397, 400 (2007).

B. The claim and the court's ruling

As noted above, Mr. Cadue was convicted of aggravated battery. As regards the instant I.C.R. 35 motion, it and accompanying documents were filed on July 30, 2017. The document that happened to have been docketed first is entitled Motion to Docket and attached thereto is Mr. Cadue's Affidavit of Truth which succinctly explains the first part of Mr. Cadue's claim.

> I make this statement to be known as under the new evidence I have submitted Exhibits (G) (H) (I), clearly support there is questions to be answered of corruption and conspiracy to gain false convictions to enhance elements of crime, that were not committed.
>
> After setting in the front yard of the location I was at, and the victim and his friend by admission had been drinking a considerable amount way past legally drunk, came across the street yelling they were going to beat the faggot out of me, all because my girl friend and I had been missing around and she painted my toe nails with polish. The victim along with his friend stated they were BOTH GOING TO BEAT ME UP, it was at that point the victim as stated on record by both the victim and states witness punched me in the nose, to where it was pumping blood at a good rate. I stated I wanted no part of it, but

> when no way out seemed possible I agreed to go to the alley behind the fence, the moment I did the victim went for his knife in his front pocket as I witnessed the end of the knife coming out I lost it and went into a rage out of the shock my life was in danger at that moment. I did go back and kick him and hit him while I was still in shock over protecting myself and I was no faggot, the name calling I could take, and an ass kicking, even if it was going to be by two, BUT WHEN THE KNIFE CAME INTO PLAY, I COULD NO LONGER THINK ABOUT IT, IN MOMENTS IF I FAILED TO ACT I WOULD BE CUT UP OR WORSE.
>
> However it was than the cover ups started, MAY BE BECAUSE I AM AN INDIAN, I DO NOT KNOW AND THE VICTIM WAS WHITE. . . .

Affidavit of Truth, p. 1 (capitalization in the original, spelling errors in the original). (R. 22.)

Mr. Cadue continued in his filings by explaining that even though the responding paramedic testified she found a knife on the victim and gave it to the police officer, the police officer lied and testified that there was no knife. (R. p. 46-47.) Stranger still, the knife was in the victim's property at the hospital even though it was not on the hospital inventory of the victim's property. (R. p. 47, 50.) In short, Mr. Cadue was asserting that the police officer lied about there being no knife to defeat his claim of self defense which also broke the chain of custody of the knife which later mysteriously showed up in the victim's property. (R. p. 48.)

In ruling, the district court first pointed out that Mr. Cadue is requesting a correction of an illegal sentence pursuant to I.C.R. 35(a). (R. p. 84.) The district court went on to discuss Idaho law regarding such motions

and Appellant will pick up the district court's discussion with *State v. Clements*, 148 Idaho 82 (2009):

> In *Clements*, the Court held that "the interpretation of 'illegal sentence' under Rule 35 is limited to sentences that are illegal from the face of the record, i.e., those sentences that do not involve significant questions of fact nor an evidentiary hearing to determine their illegality." *Id.* at 87, 218 P.3d at 1148.
>
> I.R.C. [sic] 35 is limited to legal questions surrounding the defendant's sentence. *Id.* at 88, 218 P.3d at 1149. Factual issues must be determined before the defendant files a Rule 35 motion. *See id.* Thus, if a trial court re-examines the facts underlying the crimes in a case to determine the legality of a sentence, the court will have exceeded the "narrow" scope of Rule 35 and will thus exceed the scope of its authority. *Clements*, 148 Idaho at 88, 218 P.3d at 1149. Therefore, a trial court may not re-examine the facts underlying the crimes charged to determine that a sentence is illegal. *See id.*

Order, p. 4. (R. p. 85.)

The court continued by applying the law to this case:

> Thus, in applying this standard to this case, the court recognizes that determining Cadue's claims would require significant factual findings that the court would only be able to make after reviewing certain transcripts from previous case proceedings and/or after having an evidentiary hearing where testimony is presented. Accordingly, Cadue's sentence is not illegal from the face of the record. The court may not look to the underlying facts to determine the legality of the sentence as Cadue is asking it to do.
>
> Cadue's arguments may have been raised prior to this current filing in his direct appeal or post-conviction petitions. To the extent these arguments have been raised, the factual issues have presumably been determined as Cadue's post-convictions were unsuccessful and Cadue's appeal was likewise fruitless. As such, this court is to look to the legal questions surrounding Cadue's sentence. However, Cadue is attempting to use Rule 35 as a vehicle to have this court re-examine the facts

> underlying this case; a task that is beyond the narrow limits of Rule 35 and, thus, this court's authority and jurisdiction.

Order, p. 5. (R. p. 86.)

The court went on to analyze whether the sentence is authorized by law and whether new evidence shows it is excessive:

> Therefore, this court will apply the standard set forth by the Idaho Supreme Court that Rule 35 for a correction of an illegal sentence only applies to (1) sentences that impose a penalty that is simply not authorized by law or (2) where new evidence tends to show that the original sentence was excessive. *Clements*, 148 Idaho at 86, 218 P.3d at 1147.
>
> **(1) <u>The Sentence Imposed is Authorized by Law</u>**
> Idaho Code (I.C.) authorizes a penalty of up to fifteen (15) years for the crime of Aggravated Battery. I.C. § 18-908. Cadue was sentenced to 15 years; 10 years fixed and 5 years indeterminate. Thus, from the face of the record, Cadue's s imposed sentence was authorized by Idaho law and was therefore not illegal on that basis.
>
> **(2) <u>There is No New Evidence Showing the Original Sentence was Excessive</u>**
> "When presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." *State v. Huffman*, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007).
>
> Here, Cadue has made certain claims and has attached exhibits.<u>3</u> The court must determine whether such "evidence" shows the 15 year sentence was excessive. None of these new claims or attachments shows the original sentence was excessive. First, the only new evidence submitted pertained to entirely different cases involving entirely different defendants. The information pertaining to Cadue<u>4</u> was not new as it existed prior to the imposition of sentence: from the time of discovery up through the trial. Second, nothing submitted suggests or indicates the sentence imposed was excessive. The court structured a sentence at the time of sentencing that was appropriate for the crime, the conduct, and the defendant.

> Moreover, the sentence was legal as it fit within the statutory parameters. Nothing new was submitted that would suggest mitigating factors may have been warranted in structuring the sentence.
>
> Thus, from the face of the record, Cadue's s [sic] imposed sentence was not excessive and was therefore not illegal on that basis.
>
> FOOTNOTES
> 3 Police reports; trial transcripts; another transcript from an unidentified hearing; faxes sent to Dateline and 20/20 by Jazmine Jensen; a letter sent to Dateline and 20/20 by Jazmine Jensen; Phillip Flieger's *Petition for Writ of Habeas Corpus* with its own accompanying affidavits; and a Victim's Inventory List upon Arrival at the Hospital.
> 4 Police reports; hearing and trial transcripts; and Victims Inventory List at the Hospital.

Order, p. 5-7. (R. p. 86-88.)

C. The current law concerning motions to correct illegal sentence

The current version of Idaho Criminal Rule 35(a) provides as follows:

> a) Illegal Sentences. The court may correct a sentence that is illegal from the face of the record at any time.

I.C.R. 35.

In the instant case, the district court discussed *State v. Clements*, 148 Idaho 82 (2009), in regards to the proper scope of Rule 35. However, even more recently the Supreme Court in *State v. Wolfe*, 158 Idaho 55 (2015), reaffirmed *Clements* (following *State v. Lute*, 150 Idaho 837 (2011)):

> This Court has made clear that Rule 35 motions to correct an illegal sentence must be read narrowly and that under Rule 35, a trial court cannot examine the underlying facts of a crime to which a defendant pled guilty to determine if the sentence is illegal. *See State v. Clements*, 148 Idaho 82, 84—87, 218 P.3d 1143, 1145—148 (2009). Moreover, Rule 35's purpose is to allow

> courts to correct illegal sentences, *not* to reexamine errors occurring at trial or before the imposition of the sentence. *Id.* at 85, 218 P.3d at 1146 (citing *Hill v. United States*, 368 U.S. 424, 430, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962)). Therefore, we have defined an "illegal sentence" as one that is illegal from the face of the record, does not involve significant questions of fact, and does not require an evidentiary hearing. *Id.* at 86, 218 P.3d at 1147. Because an illegal sentence may be corrected at any time, Rule 35 must necessarily be limited to uphold the finality of judgments. *Id.* We have stated that:
>
> > Rule 35 is not a vehicle designed to re-examine 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.
>
> *Id.* Therefore, we want to clarify that Rule 35 inquiries must involve only questions of law—they may not include significant factual determinations to resolve the merits of a Rule 35 claim. If a district court does inquire and make significant factual determinations, it exceeds its scope of authority under Rule 35. *Id.* at 87—88, 218 P.3d at 1148—49.

Id. p. 65 (emphasis in the original).

D. The court erred denying the motion to correct illegal sentence

While being mindful of the controlling caselaw, Appellant nevertheless argues for the reasons that he did below that the district court erred in denying his motion to correct illegal sentence. Mr. Cadue stated as follows in his Rule 35 motion:

> From the start of the arrest of RESTRICTIVE CUSTODY BY OFFICER SILVESTER OF TWIN FALLS, ATTACHED Exhibit (A) stated that defendant Perry Stated victim (Burkhart was going to pull a knife on him when in fact PERRYS ATTACHED AFFIDAVIT STATES Burkhardt was in the middle of pulling his blue handled razor knife out of his pocket when Perry punched him, out of DURESS OF BEING CUT UP IF

NOT WORSE, AS BURKHARDT WAS KNOWN TO PACK THIS KNIFE LIKE A RELIGION AS TO THREATEN OTHERS, AND MORE, THE ONLY THING WAS THE DURESS OF THOUGHT OF LOSS OF LIFE CAUSED PERRY (Defendant) herein to have the defect to protect himself by punching out the victim, when clearly by record it was the victim that walked across the street to Perry setting outside and started punching, the victims star witness attest to this, and in addition the Star Witness clearly stated there were minutes that past while the victim Mr. Burkhardt and defendant Perry were behind the fence where Burkhardt pulled the razor knife.

Exhibit (B) Transcripts clearly show testimony of Brenda Gully Magic Valley Paramedic, SENIOR RESPONDER ON THE SCENE, PAGE 470, 471, and 472 stating that her narrative report stated she in fact removed a knife and gave it to an officer at the scene, MS CRAIG MOVING TO COVER FOR THE OFFICER AS SHE ALWAYS DOES, STATED SHE WOULD ALLOW TESTIMONY THINKING IT WAS SUFFICIENT ENOUGH, AND THAT THE SIX PAGE DOCUMENT HAD A WHOLE BUNCH OF OTHER INFORMATION THAT WAS NOT PART OF TESTIMONY, **NEVER THE LESS THE DOCUMENT SHOULD HAVE BEEN ENTERED AS EVIDENCE, AS IT WAS WRITTEN AT THE TIME AND NOT GUESSED AT OVER A YEAR LATER AT TRIAL, THIS WAS PARAMOUNT.**

IN EXHIBIT (C), Transcripts that were on appeal page 216, victim states on lines 22 through 23 "HE HAD THE KNIFE ON HIM AT THE TIME OF INCIDENT WHEN ASK BY DEFENSE COUNSEL, see line 24 of page 216 exhibit (c). Than re. Page 217 lines 1 through 25, exhibit (c) victim states after he was discharged from hospital it was gave back to him as it was in the safe, when he was given back his other property. One blue Sheffield knife the same knife that Brenda Gully claimed she had gave to Officer Frick at the crime scene, re: Frick I.R. 0806324 A 215 B and every Frick I.Report, referring to the knife he took from brenda Gully, than question chain of custody documentation of knife. The Narrative Report of Brenda Gully as Exhibit (B) clearly referred to the NARRATIVE REPORT TO PHYSICAL OBJECT AT THE SCENE, than Page 471 of that and line 25 Gully the Magic Valley Paramedic Senior Medic in charge at the scene clearly STATES UNDER OATH SHE GAVE IT TO OFFICER FRICK yet in Exhibit C—1, page 430 lines 4

through 17, the officer **straight up lied stating he knew nothing of a knife, nor received a knife from GULLY.** Than on page 429 Ms Paul of Defense Counsel as if the Officer recalled this is Detective Rudner if he remembered Perry stating that HE SAID HE WAS IN FEAR FOR HIS LIFE, and Detective Rudner, stated **THERE IS A POSSIBILITY THAT HE SAID IT, BUT DID NOT RECALL. (YES).** The knife was not handed to Detective Rudner it was handed to Frick, Frick had to be the once that broke the chain of evidence. The fack is THE CHAIN OF EVIDENCE WAS BROKEN TO COVER UP A HATE CRIME, AS THE VICTIM IS A WHITE MAN, THAT HAD DRANK A PINT OF VODKA AND SOME BEERS WALKED ACROSS THE STREET TO THE DEFENDANT AND STATED LETS BEAT THE FAGGOT OUT OF HIM, MEANING THE DEFENDANT, See Page 202 of Exhibit (D), lines 20 through 25.

In the finding of Exhibit (D) page 203 the Victim was said to hit him right in the nose, him being the defendant. Than on lines 21 it was quoted as Perry (defendant) herein stating he would rather not fight.

Exhibit (E) clearly states in the victims own words he was drunk, Page 154, lines 25 had a couple of beers, and page 155 lines 1, and drank a pint of Vodka. On top of that victim states he was using Methamphetamine and marjuana prior to this. Than on Page 159 Victim states in his own words HE THOUGHT BOTH HE AND HIS FRIEND SHOULD BEAT THE FAGGOT OUT OF THIS GUY. **NOW YOU HAVE THE VICTIM AND HIS FRIEND SHOWING UP AFTER WALKING ACROSS THE STREET, DRUNK TO BEAT THE FAGGOT OUT OF PERRY THE DEFENDANT THAT WAS MINING HIS OWN BUSINESS, COUPLED WITH THE FACT THE VICTIM WAS NOT ONLY PACKING A KNIFE ADMITTED BY HIM, BUT THREATENED THE LIFE OF PERRY,** this surely would put any one in fear for their life, and bring about DRUESS THAT WOULD RESULT IN THE DEFECT OF ONE PROTECTING HIMSELF EVEN AFTER PLEADING WITH THE VICTIM AND THE VICTIMS FRIEND HE (Perry) did not want to fight as support—ed by record on transcript. Exhibit (F) page 208 the Victim himself admit's it is possible that there could be some loss of memory because he drank to much alcohol and that he is an alcoholic re; lines 5—25. States Witness that was with the Victim Stated

> Perry attempted to talk his way out of the fight, yet the VICTIM on page 210 Line 8 admits to drawing blood on Perry, and than goes on to deny Perry never spoke the words that he did not want to fight, counter to the witness testimony.
>
> **ADDITIONAL NEWLY DISCOVER SUPPORTIVE EVIDENCE**
> **It has been brought to the attention of this defendant, the reason for OFFICIALS BREAKING CHAIN OF EVIDENCE, WAS SO THAT THE KNIFE WOULD NOT BE ENTERED INTO EVIDENCE, TO SUPPORT THE REASON—ING THAT PERRY WAS INDEED ACTING OUT OF DURESS IN FEAR FOR HIS LIFE, THAT THE ONLY DEFECTS WERE (1) Perry protecting himself,** Secondly without the Knife Perry would become the defendant, as the facts IN THIS CASE INVOLVE THE SAME PLAYERS FOR THE MOST PART AS IN OTHER CASE OF INTEREST. Here there is a **clear case of police corruption, once again at lest three of the players in this case are involved in ALLEGED VIOLATIONS OF CORRUPTION OF MORAL TRUPITUDE AND CONSPIRACY IN ONE FORM OR ANOTHER, AS SUPPORTED IN ATTACHED EXHIBITS (G) Case of Flieger v. State, EXHIBIT (H) of 'Juan "Aka Booger" Alvarez Lopez"** . . .

Motion for Rule 35(a) p. 15-18 (emphasis, capitalization and grammar and spelling errors in the original). (R. p. 46-49.)

These last two mentioned cases are part of the additional materials submitted with the instant motion, and Mr. Cadue stated that the same alleged wrong doers include the same prosecutor and some of the same law enforcement personnel and the same methods were used. (R. p. 35.)

Finally, the prayer for relief concluded as follows:

> Defendant deserve's the respect of this Court to Grant an Evidentiary Hearing, and the fact that Exhibits (G),(H), and (I) clearly support allegations of Corruption etc., as A HEARING SHOULD BE ALLOWED TO INVESTIGATE WHO EXACTLY IT WAS THAT TURNED IN THE KNIFE TO THE HOSPITAL,

> THAT NOW WOULD NOT BECOME PART OF EVIDENCE AS IT WAS EXCLUDED BY MEANS OF BROKEN CHAIN OF EVIDENCE.

Motion for Rule 35(a) p. 21. (R. p. 52.)

For the above reasons, Appellant asserts the district court erred in denying his motion to correct illegal sentence.

CONCLUSION

Mr. Cadue requests this Court reverse the order of the district court denying his motion to correct illegal sentence and vacate his sentence and conviction.

DATED this 2nd day of April, 2018.

/s/ Greg S. Silvey
Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es):

Idaho State Attorney General
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Dated and certified this 2nd day of April, 2018.

/s/ Greg S. Silvey
Greg S. Silvey