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State v. Taylor Appellant's Reply Brief Dckt. 41114

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STATEMENT OF THE CASE

Nature of the Case

Andrew Taylor appeals, asserting that the district court abused its discretion when, after a period of retained jurisdiction, it denied his motion for leniency pursuant to I.C.R. 35 (*hereinafter*, Rule 35) without a hearing. As part of that argument, he contended that the two waiver provisions (the Rule 35 waiver provision and the general appellate waiver provision) in his plea agreement did not bar this appeal. Alternatively, he argued that the State did not timely invoke the waiver. Specifically, Mr. Taylor argued that the appropriate time to invoke the waiver was when the Rule 35 motion, which is now on appeal, was initially pending before the district court, or alternatively, during the earliest stage of the appeal.

The State responds, arguing that the appeal should be dismissed based on that waiver. However, it does not offer any response as to Mr. Taylor's argument that the Rule 35 waiver provision needed to be invoked when the issue was pending before the district court. As such, the invocation of the waiver constitutes a new issue improperly raised for the first time on appeal, and therefore, this Court should not address the State's argument on the waiver.

In regard to the general appellate waiver provision, the State contends that it should be allowed to invoke that provision in its Respondent's Brief. To that end it draws two superficial distinctions between the facts of Mr. Taylor's case and the facts of *Oneida v. Oneida*, 95 Idaho 105, 107 (1972), which requires the party relying on the waiver to invoke that waiver at the "earliest stage of appeal." It also argues that this Court should disavow *Oneida* because the "earliest stage of the appeal" standard from

Oneida was an insufficiently-defined period. However, neither the superficial factual distinctions nor the complaint for clarity justify the State's position. The factual distinctions do not demonstrate that the procedural requirements to invoke the respective waivers should be different in this case, and the Appellate Rules clearly delineate the earliest stage of the appeal. As such, despite the State's protestations, applying the rule from *Oneida* would provide the identified benefits of that rule, such as reducing costs on appeal and promoting judicial efficiency.

At any rate, the general appellate waiver provision is not as broad as the State contends. It only waives challenges to decisions made up through the initial sentencing determination, not to decisions made after that sentencing determination, such as the decision to not reduce the sentence after relinquishing jurisdiction. Therefore, this appeal does not fall within the scope of the waiver.

The State also contends that the sentence is appropriate as imposed, and thus, there was no abuse of discretion in the denial of Mr. Taylor's Rule 35 motion. Since that response is unremarkable, no further reply is necessary. Therefore, Mr. Taylor requests that this Court reverse the district court's order relinquishing jurisdiction, or alternatively, reverse the district court's decision denying his Rule 35 motion without a hearing, and remand the case for further proceedings.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Taylor's Appellant's Brief. With one exception, they need not be repeated in this Reply Brief. The statement of facts and course of proceedings from the Appellant's Brief are otherwise incorporated herein by reference thereto.

The necessary clarification relates to Mr. Taylor's second period of retained jurisdiction. The Appellant's Brief indicates that Mr. Taylor participated in the CAPP program. (App. Br., p.3.) However, at that time, Mr. Taylor was actually assigned to participate in the traditional rider program, not the CAPP rider. (See, e.g., PSI, p.103 (10/29/12 C-Note indicating that Mr. Taylor "will go to a traditional rider").)

ISSUE

Whether the district court abused its discretion when it denied Mr. Taylor's Rule 35 motion without a hearing.

ARGUMENT

The District Court Abused Its Discretion When It Denied Mr. Taylor's Rule 35 Motion Without A Hearing

A. The State Failed To Timely Invoke The Waiver Against Mr. Taylor's Rule 35 Motion And Subsequent Appeal

1. The State Did Not Invoke The Waiver In The District Court, And So, Its Request For This Court To Dismiss The Appeal Based On The Waiver Is A New Argument Improperly Raised For The First Time On Appeal

The State contends that Mr. Taylor's claim on appeal is barred by the waiver provision in his plea agreement. (*See generally* Resp. Br.) That waiver provision states that Mr. Taylor waived "the right to (1) file a Rule 35 Motion (except as to an illegal sentence) and (2) appeal any issues in this case, including all matters involving the plea or the sentencing and any rulings made by the court, including all suppression issues." (R., p.81 (emphasis in original).)

However, the State did not invoke the first waiver provision (*i.e.*, the Rule 35 waiver provision) when Mr. Taylor filed his Rule 35 motion (the denial of which is now on appeal) in the district court. (*See generally* R.) As a result, the State is now precluded from invoking the waiver for the first time on appeal. The appellate courts "will not address on appeal a challenge . . . where the trial court was not given an opportunity to consider the issue," absent a showing of fundamental error. *State v. Martin*, 119 Idaho 577, 579 (1991); *State v. Mauro*, 121 Idaho 178, 181 (1991); *see also State v. Gervasi*, 138 Idaho 813, 815 (Ct. App. 2003) ("As a general rule, issues must be raised before the trial court in order to be considered on appeal."), *abrogated on other grounds by State v. Hansen*, 154 Idaho 882, 887 (Ct. App. 2013). The State has

provided no response to this issue, and therefore, has failed to show fundamental error in this case. *Cf. Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 745 (2000) (holding that it is the party bearing the burden of proof to show error,¹ and that, in that case, the respondent had no such burden, and therefore, the respondent's failure to address an issue was not reason to reverse the challenged order). Since the State did not timely invoke the Rule 35 waiver when the issue was pending before the district court, it should be precluded from relying on the waiver for the first time on appeal.

2. The State Provides No Justification For Departing From The Requirement That It Invoke The Alleged Appellate Waiver At The Earliest Stage Of Appellate Proceedings

In addition to needing to invoke the Rule 35 waiver before the district court, the State also had to timely invoke the second waiver provision in accordance with the Idaho Supreme Court's requirement that parties relying on appellate waivers invoke those waivers at the earliest possible stage of the appellate proceedings. *See Oneida*, 95 Idaho at 107. The State contends that *Oneida* is inapplicable based on two distinctions between the facts of *Oneida* and those of the case at bar: (1) the waiver in *Oneida* was the product of a stipulation, rather than a waiver by only one of the parties; and (2) the appeal in *Oneida* was from an interlocutory order, not a final judgment. (Resp. Br., pp.8-9.) Alternatively, it contends that this Court should overrule, or at least, disavow *Oneida* because the "earliest stage of appeal" is an "undetermined time," and as such, forcing a respondent to comply with that requirement will not give rise to the benefits identified in *Oneida*. (Resp. Br., pp.8-11.)

¹ Since the State is trying to invoke the waiver, it necessarily bears the burden of proof of showing that the case is within the scope of the waiver.

However, in making these arguments, the State has failed to recognize the underlying requirement the Idaho Supreme Court placed on parties trying to rely on waivers of the right to appeal – specifically, that there be a motion to dismiss. *Oneida*, 95 Idaho at 106-07 (“Having failed to *move to dismiss the appeal* . . .”). The State has yet to file any such motion, and thus, at this point in the process, it cannot rely on the waiver in this case.

A request for action in the party’s appellate brief is not sufficient to constitute a motion under I.A.R. 32. See, e.g., *Gibson v. Ada County*, 138 Idaho 787, 790 n.2 (2003) (“At oral argument the Gibsons proposed augmenting the record on appeal with the relevant documents pursuant to I.A.R. 30. The County agreed and stated that it would stipulate to augmentation of the record. Over a month after the hearing we have not seen the documents at issue and *we await a motion* or stipulation to augment *filed in accord with I.A.R. 32.*”) (emphasis added). A motion pursuant to I.A.R. 32 needs to actually be filed, not simply made as part of the argument on appeal. Therefore, even if this Court were to decide that the “earliest stage of appellate proceedings” at which to raise such an objection is at the time the respondent’s brief is filed, as the State would prefer, the State has still failed to timely *file* such a motion in this case. Compare *Gibson*, 138 Idaho at 790 n.2. As a result, it cannot rely on the alleged waiver in this case.

The State is wrong in its underlying argument as well. The “earliest stage of proceedings” requirement set forth in *Oneida* is applicable to the State in this appeal. The Idaho Supreme Court was clear in its statement of the law: “Having failed to move to dismiss the appeal, the respondents are in no position to rely, in their appellate brief,

upon the alleged waiver of the right to appeal.” *Oneida*, 95 Idaho at 107. It matters not how the appellate waiver came to exist. The two distinctions the State tries to draw between Mr. Taylor’s case and the facts of *Oneida* are distinctions without a difference.

The first distinction the State attempts to draw – between a stipulation that neither party will appeal and a waiver of appeal by only one of the parties (see Resp. Br., pp.8-9) – is immaterial. In both cases, the parties are alleged to have agreed that no appeal can or will be taken from a particular decision of the district court. In *Oneida*, the parties allegedly agreed that neither would appeal the district court’s order that the property was not subject to economic division. *Id.* Similarly, in this case, Mr. Taylor allegedly agreed that he would not appeal decisions up through the sentencing determination.² (R., p.81) Just because one case involved an alleged waiver by both parties (*i.e.*, a stipulation not to appeal) and the other involved an alleged waiver by a single party does not mean the applicable legal principles are different. The party seeking to rely on the waiver of the right to appeal must still properly invoke that alleged waiver.

The other distinction the State attempts to draw – between a direct appeal from a final judgment of the case as opposed to an interlocutory appeal from a particular order in the case (see Resp. Br., pp.8-10) – is similarly irrelevant. The *Oneida* requirement is one of appellate procedure and applies regardless of whether the appeal is from an interlocutory order or a final judgment. In either case, one party is still trying to procedurally bar the other from having an issue presented to the appellate courts, and

² The scope of this term of the agreement will be discussed in depth in Section I(B), *infra*.

the Idaho Supreme Court simply requires that the party relying on the alleged waiver file a motion invoking the waiver during the earliest possible stage of the appeal. See *Oneida*, 95 Idaho at 106-07. As such, this requirement applies to the State as the party trying to rely on the alleged waiver in this case.

The State's alternative argument as to why the rule from *Oneida* should not apply is basically, that the "earliest stage of appeal" is not clear and thus, trying to comply with that requirement will not lead to the benefits identified in *Oneida*. (See generally Resp. Br., pp.10-11.) However, that contention does not demonstrate that the rule in *Oneida* is manifestly wrong or unwise or unjust, as is necessary to justify overruling such a holding. See *State v. Koivu*, 152 Idaho 511, 518 (2012) (discussing the standard a party must meet to justify a departure from precedent). In fact, *Oneida* is not manifestly wrong, and sets forth a wise and just rule that helps address potential procedural bars in appellate cases in a timely and efficient manner.

Furthermore, the State's argument is meritless, since the Appellate Rules actually set forth time frames outlining the initial stages of appeal, thereby providing a reliable time frame for the earliest stage of the appeal. After the Notice of Appeal is filed, the district court clerk has thirty days to prepare and file the appellate record. I.A.R. 27(e). The parties then have twenty-eight days after the Clerk's Record is filed to object to its contents, and if there is no objection, the record is deemed settled, and is to be filed with the Supreme Court within seven days. I.A.R. 29(a). Appellants have thirty-five days to file their initial briefs after the record has been filed with the Supreme Court. I.A.R.34(c). Therefore, even if no challenges are made to the record and no extensions are needed, the initial stage of the appeal is the first one hundred days between the

date the Notice of Appeal is filed and the first due date for the Appellant's initial brief.³ And it is not as if the State is not apprised of the relevant dates during the initial stages of the appeal. (See, e.g., Clerk's Certificate of Appeal, filed June 17, 2013 (identifying the State of Idaho as Respondent in this appeal, and indicating that the Notice of Appeal was filed on June 10, 2013); R., p.247 (Certificate of Service attesting that a copy of the Clerk's Record was sent to both parties on July 19, 2013).)

Certainly, during that initial stage of the appeal, the State could, with a cursory review of the terms of the plea agreement in the record or transcript, determine whether there was a waiver of the right to appeal and move to enforce such a waiver during that earliest stage of the appeal.⁴ Therefore, since the "earliest stage of the appeal" is not an ambiguous period of time, this Court should reject the State's contention that the rule from *Oneida* should not apply.

B. The Appellate Waiver, By Its Terms, Does Not Extend To Bar The Present Appeal Against The Decision To Deny Mr. Taylor's Rule 35 Motion Following Its Decision To Relinquish Jurisdiction

The State asserts that the terms of Mr. Taylor's plea agreement are unambiguously broad and extend to all sentencing-related determinations made in the case. (R., pp.6-7.) In fact, the wavier has a separate enumerated provision to deal with

³ Certainly, that initial period may be extended for several reasons: if an objection to the record is filed, if the court reporter or court obtains gets an extension for the time to prepare the transcript and record, if a motion to augment and suspend is filed, or if the appellant requests an extension of time to file the initial brief.

⁴ If the State were to invoke a valid waiver during that time, it could obtain the benefits identified in *Oneida*. For example, it would promote judicial efficiency and decrease costs associated with the appeal by identifying and resolving cases improperly appealed before the briefing process, rather than waiting to invoke that wavier in the response brief and waiting for a dismissal in the opinion.

Rule 35 motions. (R., p.81.) That distinct separation between the two provisions demonstrates that issues surrounding potential Rule 35 motions were not included in the general appellate waiver provision. Since the issue in this case is a Rule 35 motion, the general appellate waiver provision is not applicable to this case.

Furthermore, the Idaho Supreme Court has found that a waiver which is substantially similar to the waiver in this case, is not as broad as the State contends. *See State v. Straub*, 153 Idaho 882, 886 (2013). The relevant portion of the waiver in *Straub* provided: “By accepting this offer the Defendant waives his right to appeal any issues regarding the conviction, including all matters involving the plea or sentencing and any rulings made by the court, including all suppression issues.” *Straub*, 153 Idaho at 884-85. The waiver in this case provides that Mr. Taylor agreed to waive the right to “appeal any issues in this case, including all matters involving the plea and sentencing and any rulings made by the court, including all suppression issues.” (Resp. Br., p.6 (emphasis in original).) The only difference between the two waivers is the use of the term “case” in Mr. Taylor’s waiver instead of the term “conviction.”

While the term “case” in Mr. Taylor’s waiver may suggest a broader scope than the term “conviction” in the waiver discussed in *Straub*, the list of decisions that Mr. Taylor’s waiver provision specifically includes demonstrates that “case” actually refers to the process of obtaining a conviction and imposing sentence. This is important since, as discussed in the Appellant’s Brief, by including this list of enumerated decisions (*i.e.*, “any issues in this case, *including all matters involving the plea and sentencing and any rulings made by the court, including all suppression issues* (see R., p.81(emphasis added)), all other decisions are excluded from the scope of this

waiver provision. (See App. Br., pp.8-9.) As such, Mr. Taylor's waiver provision only encompasses those decisions which had been made prior to the plea agreement and extends to the decisions made at the sentencing hearing which was anticipated as a result of the plea agreement. By identifying that specific list of decisions, the scope of that provision does not extend to subsequent decisions after periods of retained jurisdiction or probation. The Idaho Supreme Court evidenced a similar understanding and approach to such waiver provisions in *Straub*, determining that the waiver referred to the decisions made during the initial case proceedings:

[T]he word "made," as the past tense form of the verb "to make," refers to any rulings that the district court made prior to the agreement. *Thus, the agreement neither contemplates nor has any effect on rulings that occurred after the plea agreement was reached. Since the [relevant] order occurred after the plea agreement was signed, Straub has not waived his right to appeal [that] order.*

Straub, 153 Idaho at 884-85. (emphasis added). Therefore, the scope of such waivers focuses on the decisions already made (*i.e.*, those decisions made up through the initial sentencing determination, not the decisions made after the initial sentencing determination). See *id.* The order Mr. Taylor has appealed was not entered until after the plea agreement was signed and the sentence was initially imposed. Therefore, just as in *Straub*, the scope of the general appellate waiver provision does not extend to the current appeal.

Furthermore, the decision to not reduce the sentence pursuant to Rule 35 following a period of retained jurisdiction is not the same as the sentencing decision. "Sentencing occurs before the period of retained jurisdiction begins" *State v. Coassolo*, 136 Idaho 138, 142-43 (2001). Therefore, a decision following the period of retained jurisdiction is not the same as a sentencing decision. See, *e.g.*,

State v. McGonigal, 122 Idaho 939, 940 (1992) (once a sentence is executed, the trial court does not have the authority to amend or modify that sentence unless a rule or statute authorizes such action); *State v. Johnson*, 101 Idaho 581, 585 (1980) (same); *State v. Steelsmith*, 153 Idaho 577, 580-81 (Ct. App. 2012) (applying this rule, concluding that the sentence was executed before the period of retained jurisdiction ended, and therefore, the district court could not increase the terms of the sentence following the period of retained jurisdiction). Therefore, the decision to deny a Rule 35 motion after a period of retained jurisdiction is not included in the phrase “involving the plea or sentencing and any rulings made by the court.” As a result, it is not included within the scope of the appellate waiver.

The State tries to distinguish *Straub* based on the type of decision the district court was making (restitution, as opposed to sentence reduction after relinquishment). That distinction, however, is yet another distinction without a difference. Both decisions occur after the plea agreement is reached and the sentencing is complete, and therefore, are not within the scope of such a waiver.

As a result, the phrase “any issues in this case, including all matters involving the plea and sentencing and any rulings made by the court, including all suppression issues” is properly understood to waive the right to appeal issues which may have arisen up through the time of the sentencing hearing. These issues might include the failure to strike unreliable information from the presentence investigation report, *c.f.*, *State v. Molen*, 148 Idaho 950, 961-62 (Ct. App. 2010), or the deprivation of the defendant’s right to allocute, *c.f.*, *State v. Hansen*, 154 Idaho 882, 887 (Ct. App. 2013). They do not, however, include decisions made after the end of a period of retained

jurisdiction because such decisions are not part of the “sentencing,” since “the sentencing” was completed before the period of retained jurisdiction even began. See *McGonigal*, 122 Idaho at 940; *Steelsmith*, 153 Idaho at 580-51.

Therefore, as in *Straub*, the decision now on appeal was not included in the scope of the appellate waiver. As such, this Court should consider the merits of that appeal. Even if this Court determines that the State’s reading of the agreement is also reasonable, the rule of lenity requires this Court to adopt Mr. Taylor’s reasonable interpretation of the terms of the agreement. (See App. Br., p.10.)

C. The District Court Abused Its Discretion By Denying Mr. Taylor’s Rule 35 Motion Without A Hearing

Because the State’s argument concerning the district court’s decision to deny Mr. Taylor’s Rule 35 motion is not remarkable, no further reply is necessary. Accordingly, Mr. Taylor simply refers the Court back to pages 10-15 of his Appellant’s Brief.

CONCLUSION

Mr. Taylor respectfully requests that this Court reverse the order denying his Rule 35 motion and remand this case for further proceedings.

DATED this 12th day of June, 2014.


BRIAN R. DICKSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of June, 2014, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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