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ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

BEN P. MCGREEVY
Deputy State Appellate Public Defender
I.S.B. #8712
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 45847
)	
v.)	CANYON COUNTY NO. CR-2010-25783
)	
RICARDO OZUNA, JR.,)	
)	APPELLANT'S BRIEF
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Mindful of the applicable authorities, Ricardo Ozuna, Jr., asserts in this appeal that the district court erred when it denied his motion for reconsideration of the district court's denial of his Idaho Criminal Rule 35(a) motion to correct an illegal sentence.

Statement of the Facts and Course of Proceedings

Mr. Ozuna was found guilty of lewd conduct with a minor child under sixteen, I.C. § 18-1508, with a sentencing enhancement for having been previously convicted of a sexual offense under I.C. § 19-2520G(2). (R., p.22.)¹ The district court imposed a unified sentence of life imprisonment, with twenty years fixed. (R., p.22.) Mr. Ozuna appealed, and the Idaho Court of Appeals affirmed his judgment of conviction in *State v. Ozuna*, No. 40165, 155 Idaho 697 (Ct. App. 2013). (R., pp.21-30.) Mr. Ozuna filed a petition for review, which the Idaho Supreme Court denied. (*See R.*, p.31.)

Mr. Ozuna subsequently filed a petition for post-conviction relief, and the district court summarily dismissed the petition. (*See R.*, pp.39-66.) Mr. Ozuna appealed, and the Idaho Court of Appeals affirmed the summary dismissal of the petition in an unpublished opinion, *Ozuna v. State*, No. 43659, 2016 Unpublished Opinion No. 689 (Idaho Ct. App. Sept. 16, 2016). (R., pp.67-72.)

Later, Mr. Ozuna filed, pro se, an Idaho Criminal Rule 35(a) motion to correct an illegal sentence and request for a hearing. (R., pp.33-35.) Mr. Ozuna asserted, “[t]he sentence is illegal on its face as the conviction was gained in violation of due process and/or equal protection governed by the Constitution of the U.S. and a [court’s] obligation to insure fair proceedings.” (R., p.33.) He asserted, “[i]n this case the defendant himself trie[d] to explain to the court the need for expert D.N.A. assistance and the fact his public defender is not adhering to this request to prove his innocence.” (R., p.33.)

¹ The Idaho Supreme Court ordered the record on appeal here to be augmented with the record and transcripts from Mr. Ozuna’s prior appeal, No. 40165. (R., p.99.) All citations to “R.” refer to the 102-page Limited Clerk’s Record prepared for this appeal. (*See R.*, p.99.)

Mr. Ozuna asserted the district court, at a pretrial hearing, acknowledged there was a problem with the claim by Mr. Ozuna's trial counsel that he did not have the resources to hire people to conduct DNA testing. (*See R.*, pp.34, 36.) Mr. Ozuna further asserted, "[t]he court failed to appoint and/or order an expert be appointed sua sponte in light of fundamental fairness and protect the rights of the defendant as any court is obligated to do pursuant to [the] U.S. and Idaho Constitution[s] as well as a code of judicial conduct [whereas] the conviction obtained was because of the due process right [being] violated thus rendering not only the conviction illegal but any sentence thereafter illegal." (*R.*, p.34.) He requested "the sentence and/or conviction be vacated and be remanded back to district court for further proceedings." (*R.*, p.34.)

The State filed an Objection to Rule 35 Motion and Request for Hearing. (*R.*, pp.37-38.) The district court then issued an Order Denying Motion to Correct Sentence Pursuant to I.C.R. 35(a). (*R.*, pp.73-79.) The district court wrote that the State had "not filed a response to the motion." (*R.*, p.74.) The district court also noted that the Idaho Supreme Court has "clarified that I.C.R. 35(a) does not provide a vehicle 'to reexamine 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.'" (*R.*, p.75 (quoting *State v. Clements*, 148 Idaho 82, 86 (2009)).)

According to the district court, Mr. Ozuna "alleges a purported error that occurred prior to trial, long before the court sentenced him. That purported error doesn't address the legal or statutory basis of the sentence imposed by the court, or whether the sentence was excessive in light of the facts available to the court when it sentenced him." (*R.*, p.75.) The district court stated, "[t]he defendant's argument in actual fact challenges the merits of his conviction, as the

results of DNA testing could conceivably bear on the reliability of the jury's verdict but would not have any obvious relevance to a determination of what sentence may be imposed by law once a [judgment] of conviction has been entered." (R., p.75.) Mr. Ozuna "suggests that DNA testing, or specifically the lack thereof in this case, undermines the jury's verdict and means that any sentence imposed on him is necessarily illegal." (R., pp.75-76.) The district court determined, "[t]hat argument merely repackages the defendant's attack on the underlying merits of his conviction which, as the cases discussed above make clear, the defendant is not permitted to do in a motion brought pursuant to I.C.R. 35(a)." (R., p.76.)

Further, the district court determined that "even if the defendant's argument is properly raised in an I.C.R. 35(a) motion the court isn't persuaded that it has any merit." (R., p.76.) Thus, the district court concluded: "Having carefully considered the full record in this matter, the court finds that the sole argument advanced here by the [defendant's] motion is not properly raised as an I.C.R. 35(a) motion and that the motion must be denied on that basis." (R., p.78.) "The court also finds that the arguments raised by the defendant under the umbrella of an I.C.R. 35(a) motion and/or that the court should have *sua sponte* ordered DNA testing in the case have no merit, and that the motion must be denied on that basis as well." (R., p.78.) The district court denied the Rule 35(a) motion. (R., p.78.)

Mr. Ozuna then filed, pro se, a Motion Stipulating to States Request for Hearing on Rule 35 Motion and Motion for Order for Transport. (R., p.80.) He also filed, pro se, a Motion for Reconsideration of "Order Denying Motion to Correct Illegal Sentence Pursuant To Rule 35(a)" as State Did File Response and Requested Hearing (Attached Exhibit "A"). (R., pp.83-84.) The motion for reconsideration was mailed within fourteen days from the entry of the order denying

the Rule 35(a) motion.² (*See R.*, pp.78, 84.) In the motion for reconsideration, Mr. Ozuna asserted the State had filed a response and requested a hearing on the Rule 35(a) motion. (*R.*, p.83.) Additionally, he asserted, “any sentence predicated upon a verdict of . . . guilty from a trial rife with due process violations and/or errors with this [court’s] knowledge and understanding of the need for fundamental fairness (DNA expert) is most certainly illegal on its face.” (*R.*, pp.83-84.) Mr. Ozuna asserted, “[t]o continue to excuse the repugnant neglect of defendants by purposeful inept actions of defense counsel/[attorneys] under disguise of ‘strategy’ is a conspired [demise] of this United States Constitution and should not be tolerated in the least. Further this court was aware of said need and thus should [have] made inquiry to aid in the continued false convictions of citizens of the State of Idaho.” (*R.*, p.84.)

The district court subsequently issued an Order Denying Motion for Reconsideration. (*R.*, pp.88-92.) The district court regretted the error it had made when it wrote the State had not filed a written response to the Rule 35(a) motion. (*See R.*, p.89.) However, the district court was not persuaded that reconsideration of its prior order was required, because the district court had “concluded that the defendant’s arguments were entirely without merit. The state’s response—which is in fact little more than a conclusory statement that the defendant’s motion does not provide a viable basis for the relief sought—does not in any way alter the court’s previously stated conclusion.” (*R.*, p.89.)

The district court also recognized that whether to conduct a hearing on a Rule 35 motion is directed to the sound discretion of the court, and determined Mr. Ozuna “has not identified any

² The order denying the Rule 35(a) motion was issued on November 28, 2017. (*R.*, p.73.) The motion for reconsideration was mailed on December 7, 2017. (*See R.*, p.84.) Under the “mailbox rule,” documents by pro se inmates “are considered to be filed when they are delivered to prison authorities for the purpose of mailing to the court clerk.” *Hayes v. State*, 143 Idaho 88, 91 (Ct. App. 2006).

information or arguments he intended to present at a hearing that he couldn't present in his written pleadings.” (R., pp.89-90.) The district court then determined, “[w]ithout a showing that the court’s decision to proceed without a hearing actually limited the scope of the information presented for the court’s consideration, the court has no basis to conclude that it acted outside the scope of the discretion it enjoys in this area when it declined to order a hearing on this motion.” (R., p.90.)

The district court next stated, “based on the arguments presented by defendant there is virtually no chance that additional information would have altered the court’s previously stated conclusions.” (R., p.90.) The district court had previously determined that Mr. Ozuna’s arguments failed on their merits, and that his “motion was deficient as a matter of law because the arguments raised in support of that motion merely repackaged the defendant’s attack on the underlying merits of his conviction which the defendant is not permitted to do in a motion brought under I.C.R. 35(a).” (R., p.90 (alterations and internal quotation marks omitted).) The district court wrote, “[a]s the cases relied on by the court in that order have not been overruled or abrogated, additional information presented in support of the defendant’s motion would not alter the court’s conclusion that the motion was deficient as a matter of law.” (R., p.90.)

Thus, the district court concluded: “Having carefully considered the full record in this matter, the court hereby **denies** the defendant’s motion to reconsider, and hereby re-affirms the findings and conclusions set out in the [previous order], except to the extent that the [previous order] incorrectly indicates that the State failed to file a written opposition to the Defendant’s I.C.R. 35(a) motion.” (R., p.91.) The district court also “**denies as moot** the defendant’s request for a hearing on that motion, and for an order to transport the defendant for such hearing for the reasons described above.” (R., p.91.)

Mr. Ozuna filed, pro se, a Notice of Appeal of Order Denying Motion for Reconsideration of Denial of Rule 35(a) Motion and Motion to Appoint Counsel, timely from the district court's Order Denying Motion for Reconsideration. (R., p.93.)

ISSUE

Did the district court err when it denied Mr. Ozuna's motion for reconsideration of the denial of his Idaho Criminal Rule 35(a) motion to correct an illegal sentence?

ARGUMENT

The District Court Erred When It Denied Mr. Ozuna's Motion For Reconsideration Of The Denial Of His Idaho Criminal Rule 35(a) Motion To Correct An Illegal Sentence

Mindful of the applicable authorities, Mr. Ozuna asserts that the district court erred when it denied his motion for reconsideration of the district court's denial of his Idaho Criminal Rule 35(a) motion to correct an illegal sentence.

Generally, whether a sentence is illegal or was imposed in an illegal fashion is a question of law, over which an appellate court exercises free review. *State v. Clements*, 148 Idaho 82, 84 (2009). When deciding a motion for reconsideration, a district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered. *Fragnella v. Petrovich*, 153 Idaho 266, 276 (2012). Likewise, when reviewing a trial court's decision to grant or deny a motion for reconsideration, an appellate court uses the same standard of review used by the trial court in deciding the motion for reconsideration. *Id.*

Idaho Criminal Rule 35 provides that a district court "may correct a sentence that is illegal from the face of the record at any time." I.C.R. 35(a). "[T]he term 'illegal sentence' under Rule 35 is narrowly interpreted as a sentence that is illegal from the face of the record, i.e., does not involve significant questions of fact or require an evidentiary hearing." *Clements*, 148

Idaho at 86. “[U]nder 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.” *State v. Wolfe*, 158 Idaho 55, 65 (2015) (citing *Clements*, 148 Idaho at 84-87). “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.* (citing *Clements*, 148 Idaho at 87-88).

Mindful of *Clements* and *Wolfe*, Mr. Ozuna asserts that the district court erred when it denied his motion for reconsideration of the district court’s denial of his Rule 35(a) motion to correct an illegal sentence. As Mr. Ozuna asserted in the motion for reconsideration, “any sentence predicated upon a verdict of . . . guilty from a trial rife with due process violations and/or errors with this [court’s] knowledge and understanding of the need for fundamental fairness (DNA expert) is most certainly illegal on its face.” (*See R.*, pp.83-84.) Thus, the district court erred when it denied Mr. Ozuna’s motion for reconsideration.

CONCLUSION

For the above reasons, Mr. Ozuna respectfully requests that this Court vacate the district court’s denial of his motion for reconsideration, and remand the case to the district court for further proceedings.

DATED this 23rd day of July, 2018.

/s/ Ben P. McGreevy
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, electronically as follows:

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
Delivered via e-mail to: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BPM/eas