7-15-2014

State v. Mace Appellant's Brief Dckt. 42024

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MICHELLE ALECE MACE, Defendant-Appellant.	NO. 42024 ADA COUNTY NO. CR 2005-1736 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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Nature of the Case

Pursuant to a plea agreement, Michelle Alece Mace pleaded guilty to felony malicious harassment. The district court withheld judgment and placed her on probation for a period of five years. Later, the district court revoked both probation and the withheld judgment, imposed a unified sentence of five years, with two years fixed, and retained jurisdiction. The district court subsequently placed Ms. Mace back on probation for a period of five years. After Ms. Mace violated her probation, the district court revoked probation, executed the sentence, and gave her credit for time served. Ms. Mace then filed a motion for credit for time served, and in response the district court actually reduced the award of credit. As part of this reduction, the district court withdrew credit for 93 days, for which it had previously granted credit. The district court, after characterizing the 93 days as credit for time served as a condition of probation, determined the credit had been improperly granted.

On appeal, Ms. Mace asserts that the district court erred when it withdrew the previously-granted credit for 93 days served, because it illegally increased her sentence by 93 days.

Statement of the Facts and Course of Proceedings

The State filed a Complaint alleging that Ms. Mace had committed the crime of malicious harassment, felony, in violation of Idaho Code § 18-7902. (R., pp.12-13.) Following a preliminary hearing, the magistrate found probable cause and bound Ms. Mace over to the district court. (R., pp.32-33.) The State then filed an Information charging Ms. Mace with the above offense. (R., pp.34-35.) Pursuant to a plea agreement, Ms. Mace pleaded guilty to felony malicious harassment. (R., pp.60-61.)

The district court withheld judgment and placed her on probation for a period of five years. (R., pp.62-67.) As a special condition of probation, the district court required Ms. Mace to serve 120 days in the Ada County Jail. (R., p.64.)

About three years later, the State filed a Motion for Probation Violation (Agents Warrant), alleging that Ms. Mace had violated her probation. (R., pp.86-89.) She later admitted to violating her probation through committing the new crime of simple battery. (R., pp.99-100; *see* R., p.87.) The district court then revoked probation and the withheld judgment, imposed a unified sentence of five years, with two years fixed, and retained jurisdiction. (R., pp.117-19.) The order retaining jurisdiction stated, "If the defendant does not receive probation, she is to receive credit for the one hundred fifty-seven (157) days served prior to entry of this Order." (R., p.118.)

After Ms. Mace participated in a "rider," the district court placed her back on probation for a period of five years. (R., pp.124-31.) The order reinstating probation stated, "The defendant shall receive two hundred forty-seven (247) days credit for time served prior to the entry of this Order." (R., p.129.)

Some three months later, the State filed another Motion for Probation Violation (Agents Warrant), alleging that Ms. Mace had violated her probation. (R., pp.148-50.) Ms. Mace subsequently admitted to violating her probation through failing to submit to a urinalysis test, failing to obtain written permission from her supervising officer before changing residence, and absconding from supervision. (R., pp.157-58; *see* R., p.149.) The district court revoked probation, suspended the sentence, and placed her back on probation for a period of five years. (R., pp.162-67.)

Over four months later, the State filed a Motion for Bench Warrant for Probation Violation, alleging that Ms. Mace had violated her probation. (R., pp.168-71.) She later

admitted to violating her probation through failing to report to her supervising officer, absconding from supervision, failing to obtain written permission from her supervising officer before changing her residence, and failing to successfully complete the Providence program. (R., p.183; *see* R., pp.169-70.) The district court revoked probation and executed the underlying unified sentence of five years, with two years fixed. (R., pp.185-87.) The district court also gave Ms. Mace 401 days credit for time served. (R., p.186.)

About two months later, the district court issued an Amended Order Revoking Probation, and Execution of Judgment of Conviction, giving Ms. Mace 530 days credit for time served. (R., pp.188-90.)

Some six months later, Ms. Mace filed a Motion for Credit for Time Served. (R., pp.191-92.) The motion requested "[t]hat the Court issue an Order, granting the Defendant credit for all local, county and state time served in conjunction with this charge, and the resulting sentence imposed by the Court." (R., p.191.)

In email correspondence with the parties regarding the motion for credit for time served, the district court (with a new presiding district judge) stated that it would be significantly reducing the credit for time served, on the basis that some of the credit was "credit for time served as a condition of probation." (R., pp.198-202.) According to the district court, "the credit was given in error, so it will not figure into the final tally." (R., p.198.) Via email, Ms. Mace asserted that, based on the Idaho Court of Appeals' unpublished opinion in *State v. Hoid*, No. 39304, 2012 Unpublished Opinion No. 772, 2012 WL 9189566 (Ct. App. Dec. 24, 2012), "the court does have the authority to give credit for that probation time but it would be under ICR 35." (R., pp.200-01.)

At the motion hearing, there was no disagreement that Ms. Mace was entitled to, at a minimum, 410 days credit for time served. (Tr., p.7, Ls.8-20.) The district court informed the parties that it was prepared to give Ms. Mace 410 days credit for time served. (Tr., p.7, Ls.21-23.) Ms. Mace still sought additional credit. (See Tr., p.8, L.17 – p.9, L.21.) The district court indicated that it disagreed with giving Ms. Mace "credit for time served as a condition of probation," but heard argument and took the issue under advisement. (Tr., p.7, L.23 – p.14, L.16.) Ms. Mace asserted that, while the *Hoid* opinion was unpublished, it had been invoked "more for the cases cited within the [*Hoid*] case." (Tr., p.9, Ls.4-7.) Based on *Hoid*, the district court had essentially given Ms. Mace the credit under an Idaho Criminal Rule "35(b) criminal motion for reduction of sentence," and "once she's given that . . . to take that credit away would be an unlawful increase in her sentence." (*See* Tr., p.9, Ls.15-21.) The State argued that the credit was merely "lumped into the total," and the district court had not intended "to exercise discretion to give those . . . days." (Tr., p.13, L.22 – p.14, L.2.)

The district court subsequently issued a Memorandum Decision Regarding Credit for Time Served, awarding Ms. Mace credit for 410 days served. (R., pp.212-16.) The district court determined that the prior presiding judge actually "gave credit for 93 days served as a condition of probation." (R., p.214 & n.2.)[1] Thus, Ms. Mace "received credit for 93 days served as a condition of probation." (R., p.214.)

The district court then stated, "As a question of law, the Court finds that Defendants are never entitled to credit for time served as a condition of probation. Our

[1] Before the district court determined that Ms. Mace had "received credit for 93 days served as a condition of probation" (R., p.214), the parties and district court had taken the view that Ms. Mace had received "120 days of credit for time served as a condition of probation." (R., p.198; *see* Tr., p.6, Ls.9-14, p.13, L.22 – p.14, L.4.)

appellate courts have been clear on this point." (R., p.214.) With respect to *Hoid*, the district court was "not persuaded that courts can do by criminal rule what they cannot do by statute." (R., p.215.) "A judge has no discretion to grant credit for time served as a condition of probation as a means of reducing a defendant's sentence under Idaho Criminal Rule 35." (R., p.215.) Thus, the district court "denie[d] Defendant credit for the 93 days served as a condition of probation." (R., p.216.)

Ms. Mace then filed a Notice of Appeal timely from the Memorandum Decision Regarding Credit for Time Served. (R., pp.217-19.)

ISSUE

Did the district court err when it withdrew a previous grant of 93 days credit for time served, because it illegally increased Ms. Mace's sentence by 93 days?

ARGUMENT

The District Court Erred When It Withdrew A Previous Grant Of 93 Days Credit For Time Served, Because It Illegally Increased Ms. Mace's Sentence By 93 Days

A. Introduction

Ms. Mace asserts that the district court erred when it withdrew a previous grant of 93 days credit for time served, because it illegally increased her sentence by 93 days. The district court essentially reduced Ms. Mace's sentence by 93 days as authorized under Idaho Criminal Rule 35(b), and was not authorized to subsequently increase her sentence by withdrawing credit for the 93 days.

B. Applicable Law

"[O]nce a valid sentence has been executed, a district court may not modify it unless a rule or statute so authorizes." *State v. Steelsmith*, 153 Idaho 577, 580 n.2 (Ct. App. 2012). "[W]hen a trial court has initially sentenced a criminal defendant to a definite term of imprisonment, but has suspended the sentence and granted probation, it may not later upon revocation of probation set aside that sentence and increase the term of imprisonment." *State v. Pedraza*, 101 Idaho 440, 443 (1980). Thus, once a district court has given credit for time served or granted a reduction of sentence upon revocation of probation, a later withdrawal or denial of that credit or reduction constitutes an illegal increase of sentence unless the credit or reduction was itself unlawful. *See Pedraza*, 101 Idaho at 443; *Steelsmith*, 153 Idaho at 580-83.

C. The District Court Illegally Increased Ms. Mace's Sentence By 93 Days Because It Essentially Reduced Her Sentence By 93 Days Under Idaho Criminal Rule 35(b) And Could Not Subsequently Increase Her Sentence By Those 93 Days

Ms. Mace asserts that, by withdrawing credit for 93 days, the district court illegally increased her sentence by 93 days. Upon revoking her probation, the district

court was authorized to reduce her sentence under Idaho Criminal Rule 35(b). Once the district court essentially reduced Ms. Mace's sentence by 93 days under Rule 35(b), it was not authorized to subsequently increase her sentence by denying the 93 days.

Upon withdrawing the previously-granted "credit for 93 days served as a condition of probation," the district court cited the *Hoid* footnote invoked by Ms. Mace, which states:

> Because a defendant is not statutorily entitled to credit for time served as condition of probation, a post-sentencing discretionary "credit" for that time served effectively constitutes a reduction of sentence pursuant to Idaho Criminal Rule 35(b).

(R., pp.214-15 (quoting *State v. Hoid*, No. 39304, 2012 Unpublished Opinion No. 772, 2012 WL 9189566, at *2 n.1 (Idaho Ct. App. Dec. 24, 2012).) The district court then stated that it was "not persuaded that courts can do by criminal rule what they cannot do by statute. Case law interpreting Idaho Code § 18-309 would be meaningless if a judge could circumvent the clear prohibition on awarding credit for time served as a condition of probation by simply relabeling the credit a '[R]ule 35 reduction.'" (R., p.215.)

However, Idaho case law shows, in other contexts, that courts actually "can do by criminal rule what they cannot do by statute." For example, the Idaho Court of Appeals held that, although I.C. § 19-2601(4) did not authorize a district court, in the context of relinquishing jurisdiction, "to add fines, costs, and a driver's license suspension to [a defendant's] judgment of conviction after the judgment was entered and executed," Idaho Criminal Rule 35(a) authorized the district court to add "the mandatory portion of the license suspension and the mandatory portion of the fines . . . because their prior absence from [the defendant's] sentence made the sentence illegal." *Steelsmith*, 153 Idaho at 582; *see also State v. Mendenhall*, 106 Idaho 388, 391-94 (Ct. App. 1984) (holding that a district court, despite I.C. § 19-2603's prohibition against

increasing original sentences upon revoking probation, could modify sentences for escape under Rule 35 "to bring them into conformity with the mandate of § 18-2505").[2]

In *Steelsmith*, the Court observed that, "The only action that the statute authorizes the court to take during the period of retained jurisdiction is to 'suspend the execution of the judgment and place the defendant on probation.'" *Steelsmith*, 153 Idaho at 582 (quoting I.C. § 19-2601(4)). However, the defendant's "original sentence was illegal to the extent that it did not include a license suspension," because the defendant had been convicted under I.C. § 18-8004 and 18-8005(6), which required a mandatory one-year suspension of driving privileges. *Id.* The original sentence was also illegal "to the extent that it did not include . . . mandatory fines . . . ." *Id.* at 582-83. Thus, the district court was authorized to add the mandatory license suspension and mandatory fines to correct the sentence under Rule 35(a), even though it was not authorized to make those additions under I.C. § 19-2601(4).[3] *See id.* at 582-83.

By analogy to *Steelsmith*, the district court here was authorized to reduce Ms. Mace's sentence by 93 days under Idaho Criminal Rule 35(b), even though it was not authorized to give her credit for 93 days served as a condition of probation under I.C. § 18-309. As the district court correctly noted (R., p.214), I.C. § 18-309 does not authorize a district court to give credit for time served as a condition of probation. *E.g.*, *State v. Banks*, 121 Idaho 608, 610 (1992); *State v. Albertson*, 135 Idaho 723, 725 (Ct. App. 2001). However, Rule 35(b) provides that a district court may reduce a sentence "upon revocation of probation." I.C.R. 35(b); *see Albertson*, 135 Idaho at 726.

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[2] *Steelsmith* and *Mendenhall* were two of the cases referenced by Ms. Mace as "the cases cited within the [*Hoid*] case" (*See* Tr., p.9, Ls.4-7), because the *Hoid* unpublished opinion referenced them. *See Hoid*, 2012 WL 9189566, at *3.

"When a trial court revokes a defendant's probation, the court possesses authority under I.C.R. 35 to *sua sponte* reduce the sentence. The decision whether to do so is committed to the discretion of the court." *State v. Hoskins*, 131 Idaho 670, 672 (Ct. App. 1998). Thus, although Section 18-309 did not authorize the district court to give Ms. Mace credit for 93 days served as a condition of probation, Rule 35(b) did authorize the district court to reduce her sentence by 93 days. *See Steelsmith*, 153 Idaho at 582-83.

In light of the above, the district court, upon revoking probation, essentially reduced Ms. Mace's sentence by 93 days as authorized under Rule 35(b). Once the district court did so, it was not authorized to subsequently increase her sentence withdrawing credit for the 93 days. *See Pedraza*, 101 Idaho at 443; *Steelsmith*, 153 Idaho at 580 & n.2. Thus, by denying Ms. Mace the previously-granted 93 days, the district court illegally increased her sentence by 93 days.

The fact that the district court characterized the 93-day reduction of sentence as a grant of credit for time served is immaterial. In *Steelsmith*, the Court held that the district court was authorized to add the mandatory license suspension and mandatory fines under Rule 35(a), even though the district court ostensibly added the suspension and fines pursuant to I.C. § 19-2601(4). *See Steelsmith*, 153 Idaho at 579-80, 582-83. Similarly, even though the district court here ostensibly gave Ms. Mace credit for time served as a condition of probation, it was still authorized to reduce her sentence upon revoking probation under Rule 35(b).

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[3] The district court in *Steelsmith* was not authorized to suspend the defendant's license beyond the one-year mandatory minimum term, nor was it authorized to impose non-mandatory fines. *Steelsmith*, 153 Idaho at 582-83.

The district court erred when it denied Ms. Mace the previously-granted 93 days, because it illegally increased her sentence by 93 days. The withdrawal of credit for the previously-granted 93 days should be vacated, and the 93-day reduction of sentence under Rule 35(b) restored.

CONCLUSION

For the above reasons, Ms. Mace respectfully requests that this Court vacate the withdrawal of credit for the 93 days, and remand the case with instructions to the district court to amend the Memorandum Decision Regarding Credit for Time Served to restore the 93-day reduction of sentence under Idaho Criminal Rule 35(b).

DATED this 15th day of July, 2014.

BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 15th day of July, 2014, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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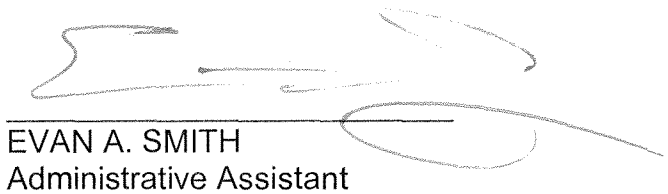

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