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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46134-2018
Plaintiff-Respondent,)	
)	ADA COUNTY
v.)	NO. CR01-16-35619
)	
ARTURO GONZALES FLORES,)	
)	
Defendant-Appellant.)	
_____)	

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**

HONORABLE SAMUEL A. HOAGLAND
District Judge

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
Nature of the Case	1
Statement of Facts and Course of Proceedings	1
ISSUE PRESENTED ON APPEAL	3
ARGUMENT	4
The District Court Erred In Denying Mr. Flores’ Motion To Correct An Illegal Sentence	4
A. Introduction	4
B. Standard Of Review	4
C. The Sentence Mr. Flores Received Is Illegal From The Face Of The Record	4
CONCLUSION	6
CERTIFICATE OF SERVICE	6

TABLE OF AUTHORITIES

Cases

State v. Bates, 63 Idaho 119 (1941)4

State v. Beavers, 152 Idaho 180 (Ct. App. 2010)5

State v. Farwell, 144 Idaho 732 (2007).....4

State v. Flores, No. 45188 (Ct. App. Nov. 30, 2018)1

State v. Sittre, 2008 WL 9468288 (Ct. App. 2008).....5

Statutes

Idaho Code § 19-2514.....*passim*

Idaho Code § 37-2732(c).....2, 5

Idaho Code § 37-2739.....5

Rules

Idaho Criminal Rule 35(a).....1, 2, 6

STATEMENT OF THE CASE

Nature of the Case

Arturo Gonzales Flores appeals from the district court's order denying his Idaho Criminal Rule 35(a) motion to correct an illegal sentence. He contends the district court erred in denying his motion because his sentence is illegal.

Statement of Facts and Course of Proceedings

The State charged Mr. Flores with two counts of felony possession of a controlled substance (heroin and methamphetamine), and alleged he was a persistent violator within the meaning of Idaho Code § 19-2514. (45188 R., pp.36-37, 51-52.)¹ A jury found Mr. Flores guilty of both charges, and found he had two prior felony convictions, making him a persistent violator. (45188 R., pp.154-55.) The district court sentenced Mr. Flores as a persistent violator to two unified terms of fifteen years, with three years fixed, to be served concurrently. (45188 Tr., p.538, Ls.12-15.) Mr. Flores filed a timely notice of appeal from the judgment of conviction. (45188 R., pp.213-17, 221-24.) On appeal, Mr. Flores argued the district court erred in denying his motion to suppress. The Court of Appeals affirmed in an unpublished opinion. *See State v. Flores*, No. 45188 (Ct. App. Nov. 30, 2018).²

In the case at bar, Mr. Flores appeals from the district court's post-judgment order denying his Idaho Criminal Rule 35(a) motion for correction of illegal sentence. In his pro se Rule 35(a) motion, Mr. Flores argued his sentence is illegal because: (1) the district court lacked jurisdiction to punish him as a persistent violator because he had more than two prior felony

¹ The Supreme Court augmented the Record in this case to include the Clerk's Record and Report's Transcripts filed in Mr. Flores's prior appeal, Case No. 45188-2017. (R., p.2.)

² Mr. Flores has filed a Petition for Review and, as such, the Court of Appeals' decision is not yet final.

convictions, and the persistent violator statute only applies to the third felony conviction; (2) the enhancement set forth in the Uniform Controlled Substances Act trumps the persistent violator enhancement with respect to violations of Idaho Code § 37-2732(c); (3) Mr. Flores is not subject to the persistent violator enhancement because the crimes he was charged with violating were not designated as felonies at the outset; and (4) Idaho Code § 19-2514 violates the due process and equal protection clauses of the United States and Idaho Constitutions. (R., pp.12-25.) The district court issued an order on June 27, 2017, denying Mr. Flores' Rule 35(a) motion, concluding his sentence was not illegal. (R., pp.26-32.) Mr. Flores filed a timely notice of appeal on July 12, 2018. (R., pp.33-36.)

ISSUE

Did the district court err in denying Mr. Flores' motion to correct an illegal sentence?

ARGUMENT

The District Court Erred In Denying Mr. Flores' Motion To Correct An Illegal Sentence

A. Introduction

The district court erred in denying Mr. Flores' motion to correct an illegal sentence because Mr. Flores' sentence is illegal.

B. Standard Of Review

Whether a sentence is illegal is a question of law over which this Court exercises free review. *State v. Farwell*, 144 Idaho 732, 735 (2007).

C. The Sentence Mr. Flores Received Is Illegal From The Face Of The Record

Mr. Flores raised four arguments in the district court in support of his motion for an illegal sentence, and he repeats these four arguments on appeal. (R., pp.12-25.) First, Mr. Flores contends his sentence is illegal because the district court lacked jurisdiction to punish him as a persistent violator under Idaho Code § 19-2514 because he had more than two prior felony convictions, and section 19-2514 applies only upon conviction of a third felony. (R., pp.13-17.) Section 19-2514 provides for an enhanced sentence for “[a]ny person convicted for the third time of the commission of a felony” Mr. Flores contends that, under the plain language of this statute, he is not subject to the persistent violator enhancement because this was not his third felony conviction. He makes this argument mindful of *State v. Bates*, 63 Idaho 119 (1941), where the Idaho Supreme Court rejected the defendant’s argument that he was not a persistent violator within the meaning of § 19-2514 upon his fourth felony conviction, stating “the legislature never intended . . . that one would be a persistent violator upon the conviction of a third offense but not upon a fourth or any subsequent one.”

Mr. Flores next contends his sentence is illegal because the enhancement set forth in the Uniform Controlled Substances Act, Idaho Code § 37-2739, trumps the persistent violator enhancement, Idaho Code § 19-2514, with respect to violations of Idaho Code § 37-2732(c). (R., pp.17-18.) Section 37-2739(a) states, in pertinent part, that “[a]ny person convicted of a second or subsequent offense under [the Controlled Substances Act] . . . may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.” Mr. Flores contends this more specific sentencing enhancement controls over the more general enhancement set forth in section 19-2514. The district court rejected this argument, concluding that “case law indicates that *both* sentencing enhancements can be charged.” (R., p.29.) Mr. Flores contends the cases cited by the district court, *State v. Beavers*, 152 Idaho 180 (Ct. App. 2010), and *State v. Sittre*, 2008 WL 9468288 (Ct. App. 2008), do not support its conclusion. Mindful of the lack of legal authority supporting his position, and the fact that the plain language of section 19-2514 does not limit its application, Mr. Flores contends his sentence is illegal because he could not be subject to the persistent violator enhancement for a repeat violation of the Controlled Substances Act.

Mr. Flores next contends his sentence is illegal because he cannot be sentenced as a persistent violator because the crimes he was charged with violating were not designated as felonies at the outset. (R., pp.19-20.) He contends that his convictions in this case did not constitute felonies until the district court imposed sentence. (R., pp.19-20.) The district court rejected this argument, concluding Mr. Flores was charged with two felonies from the outset, because he was charged with possession of methamphetamine and heroin, both of which are punishable by up to seven years in prison. (R., p.30.) Mindful of the fact that he was charged with violating Idaho Code § 37-2732(c), which specifically states the crime charged is a felony,

he contends he would have been convicted of a misdemeanor if the district court had ordered him to pay a fine less than \$1,000. (R., pp.19-20.)

Finally, Mr. Flores contends his sentence is illegal because Idaho Code § 19-2514 violates the due process and equal protection clauses of the United States and Idaho Constitutions because it “fails to provide any enhancement penalties when it comes to the punishment by fine.” (R., pp.20-21.) Mr. Flores contends it is a constitutional violation for the term of imprisonment to be enhanced, but not the fine. (R., p.21.) The district court rejected this argument, noting Mr. Flores cited no legal support or authority in support of his argument. (R., p.30.) Mindful of the district court’s decision, Mr. Flores contends the district court erred.

CONCLUSION

Mr. Flores respectfully requests that this Court vacate the district court’s order denying his Rule 35(a) motion, and remand this case to the district court for further proceedings.

DATED this 28th day of December, 2018.

/s/ Andrea W. Reynolds
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of December, 2018, I caused a true and correct copy of the foregoing APPELLANT’S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
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/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

AWR/eas