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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46221-2018
Plaintiff-Respondent,)	
)	CANYON COUNTY NO. CR-2014-5985
v.)	
)	
JAYSON LEE HOF,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON**

HONORABLE DAVIS F. VANDERVELDE
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Jason Lee Hof appeals from the district court's order denying his motion to correct an illegal sentence, made pursuant to I.C.R. 35(a). Mr. Hof was convicted of felony DUI and sentenced as a persistent violator to forty years, with ten fixed, after he pled guilty to an Information's allegations that he committed his second DUI in fifteen years, and that he had *four* previous felony convictions. In his Rule 35 motion, Mr. Hof claimed his sentence was illegal on several grounds, including that the application of I.C. § 19-2514's persistent violator enhancement to his *fifth* conviction was unauthorized and illegal.

On appeal, and mindful of the holding in *State v. Clements*, 148 Idaho 82, 86 (2009), that by pleading guilty to a sentence enhancement a defendant waives his fact-based statutory defense to the enhancement, Mr. Hof asserts that his sentence is illegal because by its plain language, I.C. § 19-2514's enhancement applies only on the "*third* conviction," and because it is clear on the face of the record that his DUI conviction was not his third conviction. The district court's order denying Mr. Hof's Rule 35 motion should be reversed.

Statement of the Facts and Course of Proceedings

On March 17, 2014, Jason Hof was pulled over by an officer and arrested for driving while under the influence of alcohol. (Aug.R., pp.5-8.)¹ Following a preliminary hearing, the State filed a three-part Information. Parts I and II charged Mr. Hof with committing felony DUI on March 17, 2014, in violation of I.C. § 18-8003 and I.C. § 18-8005, having previously been

¹ This Court ordered that the appellate record be augmented with the clerk's record and transcript from Mr. Hof's prior appeal, No. 42443-2014, *State v. Hof* (Canyon County No. CR-2014-5985). See Order Augmenting Appeal, filed August 10, 2018. References to the items in the prior appeal are cited as "Aug.R" and "Aug.Tr."

convicted of felony DUI on May 17, 2004. (Aug.R., pp.14-17.). Part III of the Information contained a citation to the persistent violator statute, I.C. § 19-2514, and alleged Mr. Hof had *four* specific previous felony convictions:

- felony conviction for DUI on October 4, 1993;
- felony conviction for DUI on May 18, 1995;
- felony conviction for DUI on April 5, 1996; and
- felony conviction for DUI on May 21, 2004.

(Aug.R., pp.17-19.)

Pursuant to an agreement with the State, Mr. Hof pled guilty to the felony DUI as charged in Parts I and II, and he pled guilty to the allegations in Part III. (Aug.Tr.17, L.7 – p.19, L.1.) At his plea hearing, Mr. Hof acknowledged that because of the persistent violator enhancement he faced a possible sentence of up to life. (Aug.Tr., p.10, Ls.18-22.) The district court informed him that “you must have at least two prior felonies” and that “by virtue of those felonies, you will be admitting the persistent violator, which means your sentence can be enhanced, as we have discussed.” (Aug.Tr., p.12, Ls.4-11.) Before accepting Mr. Hof’s guilty plea to the persistent violator charge, the district court had Mr. Hof admit all four of the previous felony convictions that were alleged in the Information. First, he admitted a previous DUI felony DUI conviction, in Canyon County, on May 17, 2004. (Aug.Tr., 17, Ls.7-17.) The following additionally colloquy took place:

THE COURT:	Now, let’s turn to the information part 3. How do you plead to the enhancement, Mr. Hof, of being a persistent violator?
THE DEFENDANT:	Guilty, Your Honor.

THE COURT: Okay, Mr. Hof. Can you tell me, as articulated there in the information, what prior felony convictions have you been convicted of?

THE DEFENDANT: Driving under the influence, ma'am.

THE COURT: And what were the dates of those convictions, sir?

THE DEFENDANT: October of '93.

THE COURT: Was that a felony?

THE DEFENDANT: Yes, ma'am.

THE COURT: Was that in Canyon County – I'm sorry, Cassia County?

THE DEFENDANT: Yes, ma'am.

THE COURT: Okay. What else?

THE DEFENDANT: May of '95.

THE COURT: What county, sir?

THE DEFENDANT: Ada.

THE COURT: Was that also a felony?

THE DEFENDANT: Yes, ma'am.

THE COURT: And what else?

THE DEFENDANT: '96, April of 1996.

THE COURT: And what was that a conviction for?

THE DEFENDANT: Ada County.

THE COURT: That was in Ada County, and was that also for operating a motor Vehicle under the influence?

THE DEFENDANT: Yes, ma'am.

THE COURT: And Mr. Hof, are you the individual that has been convicted of each of the felonies that you have just listed there for me?

THE DEFENDANT: Yes, ma'am.

(Aug.Tr., p.17, L.16 – p.19, L.2.)

At sentencing, the district court again noted that it was sentencing Mr. Hof on his *fifth* felony DUI and then imposed a forty-year sentence, with ten years fixed. (Aug.Tr., p.30, L.7, p.31, Ls.13-17.) Mr. Hof timely appealed the judgment and sentence. (Aug.R., pp.48-49.) The Idaho Court of Appeals affirmed. *State v. Hof*, Unpublished Opinion No. 42443, filed July 17, 2015.

On November 6, 2017, Mr. Hof filed a pro se motion to correct an illegal sentence, pursuant to Idaho Criminal Rule 35(a), (R., p.25), and the district court appointed counsel (R., p.38).² Mr. Hof raised several grounds for declaring his sentence illegal, including that the district court lacked jurisdiction and authority to sentence him to an enhanced term under the persistent violator statute, I.C. § 19-2514, because by its plain terms, the enhancement applies only on a *third* conviction, and the record affirmatively demonstrates that the underlying substantive offense for which he was convicted and sentenced was *not* his third conviction. (R., pp.25-37.) The statute reads:

19-2514. PERSISTENT VIOLATOR — SENTENCE ON THIRD CONVICTION FOR FELONY. Any person convicted for the third time of the commission of a felony, whether the previous convictions were had within the state of Idaho or were had outside the state of Idaho, shall be considered a persistent violator of law, and on such third conviction shall be sentenced to a term in the custody of the state board of correction which term shall be for not less than five (5) years and said term may extend to life.

I.C. § 19-2514.

Mr. Hof argued that under the statute’s plain terms, the sentencing enhancement provision applies on the “third conviction” and no other, and that the statute must be applied

² Mr. Hof objected to the appointment of the public defender and requested conflict-free counsel; after a hearing, the district court declined to appoint new counsel. (R., pp.41-43; Tr., p.4, L.18 – p.6, L.24.) Mr. Hof does not challenge that ruling on appeal.

as written, citing *Verska v. St. Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889 (2011), and *State v. Montgomery*, 163 Idaho 40 (2017). (R., pp33-37, 50-52).

The State filed no written response. (*See generally* R.) However, at the hearing on the Rule 35 motion, the prosecutor argued:

The State would read plain language of persistent as meaning the he is *eligible*. And from that point forward, *I realize there is language that says* and [on] such third conviction shall be sentenced to a term custody.

The State does not read the statute that same way. ...

(Tr., p.14, Ls.11-16.) (Emphasis added.)

After taking the matter under advisement, the district court issued its written order denying Mr. Hof's motion. (R., pp.55-61.) The district court concluded that Mr. Hof's argument "was presented to the Idaho Supreme Court and rejected," in *State v. Bates*, 63 Idaho 119 (1941), and that *Bates* controlled in this case. (R., pp.59-60.)

Mr. Hof filed a Notice of Appeal that is timely from the district court's order. (R., p.62.)

ISSUE

Did the district court err in denying Mr. Hof's motion to correct his illegal sentence?

ARGUMENT

The District Court Erred When It Denied Mr. Hof's Rule 35(a) Motion To Correct His Illegal Sentence

A. Introduction

Mr. Hoff asserts that his forty-year sentence for felony DUI is not authorized by law and is illegal on the face of the record. Mindful of the Idaho Supreme Court's holding in *State v. Bates*, 63 Idaho 119 (1941), that "the legislature never intended that by [the persistent violator statute] one would be a persistent violator upon the conviction of a third offense but not upon a fourth or subsequent offense," Mr. Hof claims the sentence is illegal because it exceeds the maximum ten-year term allowed by the DUI statute, and because the persistent violator statute's sentencing enhancement provision, by its own terms, did not authorize the sentence imposed in his case. By its plain language, I.C. § 2514's provision for an enhanced sentence applies to the third felony conviction only. Because Part III of the Information alleged Mr. Hof had *four* previous felony convictions – with the conviction for underlying substantive offense to be no less than his *fifth* such conviction – I.C. § 19-2514's sentencing enhancement provision could not apply, and could not authorize an enhanced sentence in this case. Mindful of the fact that he pled guilty to the enhancement, and of the holding in *State v. Clements*, 148 Idaho 82, 86 (2009), Mr. Hof asserts that his forty-year term, with ten fixed, exceeds the ten-year maximum allowed by the DUI statute and is therefore an illegal sentence. Mr. Hof is entitled to relief under Rule 35(a).

B. Standards Of Review

The appellate court freely reviews a district court's ruling on a Rule 35 motion to correct an illegal sentence. *State v. McKinney*, 153 Idaho 837, 840 (2013). Questions of statutory

interpretation are questions of law and are likewise freely reviewed. *State v. Owens*, 158 Idaho 1, 3 (2015).

C. The Illegality Of The Sentence Must Be Determined From The Face Of The Record

Idaho Criminal Rule 35(a) provides, “The court may correct a sentence that is illegal from the face of the record at any time.” I.C.R. 35(a). The rule is limited to legal questions surrounding the defendant’s sentence, and any factual issues must be apparent from the face of the record. *Id.* at 88, 218 P.3d at 1149. In *Clements*, the Court explained, “[t]he determination of whether a sentence is illegal is made by reference to the authorizing statute or applicable constitutional provisions and is, therefore, a matter of statutory interpretation.” *Id.*, at 86 (quoting *Brown v. State*, 99 P.3d 489, 491 (Wyo.2004)).

1. Mr. Hof’s Claim Can Be Determined On The Face Of The Record Without Resort To Additional Fact Finding

Mr. Hof’s claim that his sentence is illegal can be determined on face of the record, without resort to additional fact finding. This case is like *State v. Kerrigan*, 143 Idaho 185, 188 (2006), wherein the defendant argued that his sentence was illegal because the district court lacked authority to impose a sentencing enhancement, and neither the appellate court nor the trial court needed to review anything beyond the basic public records concerning the conviction and sentence, and the statutory language of the enhancements, in order to address the merits of the defendant’s claim. Like in *Kerrigan*, neither the district court nor the appellate court is required to reexamine the underlying facts surrounding Mr. Hof’s crime to determine whether his sentence is illegal. Like in *Kerrigan*, the merits of the Rule 35 claim can be addressed without reviewing “anything beyond the basic public records concerning the conviction and sentence, and the statutory language of the enhancements.” *Id.*, at 188.

Mr. Hof is mindful that in *Clements*, the Idaho Supreme Court held that by having previously pled guilty to the statutory firearm enhancement, the defendant waived the fact-based statutory defense³ to that enhancement, which he was attempting to raise for the first time under Rule 35. 148 Idaho at 86. Mr. Hof also acknowledges that he pled guilty to the Information’s Part III and that “[a] valid plea of guilty, voluntarily and understandingly given, waives all non-jurisdictional defects and defenses, whether constitutional or statutory, in prior proceedings.” *Id.*, at 86. Nonetheless, he argues that his Rule 35 motion should be addressed on its merits because the Information’s own affirmative factual allegations make clear that the enhancement was not authorized in his case and the forty-year sentence is illegal on its face without resort any fact finding.

2. The Plain Language Of I.C. § 19-2514 Authorizes An Enhanced Sentence On The Person’s Third Conviction Only; Bates Should Be Overturned

Idaho’s “persistent violator” sentencing statute subjects any person who is convicted of a felony for the third time to enhanced penalty on such third felony conviction.

19-2514. PERSISTENT VIOLATOR — SENTENCE ON THIRD CONVICTION FOR FELONY. Any person convicted *for the third time* of the commission of a felony, whether the previous convictions were had within the state of Idaho or were had outside the state of Idaho, shall be considered a persistent violator of law, *and on such third conviction* shall be sentenced to a term in the custody of the state board of correction which term shall be for not less than five (5) years and said term may extend to life.

I.C. § 19-2514. (Emphasis added.)

By its plain terms, the statute pertains to persons convicted of a felony “for the third time” and that such person shall be “considered a persistent violator of law.” Regarding the

³ In *Clements*, the defendant had pled guilty to two firearms enhancements, both pursuant to I.C. § 19-2520. 148 Idaho at 84. The “fact-based statutory defense” raised in the Rule 35 motion is provided in a *different* statute, I.C. § 19-2520E. Mr. Hof’s claim, by contrast, does *not* arise from a different statute.

enhancement, the plain language provides, “and *on such third conviction shall be*” sentenced to a minimum term of five years up to life. *Id.* Mr. Hof’s claim focuses on that second of these consequences.

Because the plain language of I.C. § 19-2514 authorizes an enhanced sentence only on the third felony conviction, and because the face of the record demonstrates that the underlying conviction was *not* Mr. Hof’s third felony conviction, Mr. Hof asserts that the enhanced sentence imposed in his case was not authorized by law and is illegal, and that *Bates* should be overturned. Mindful of the fact that he pleaded guilty to the persistent violator charge, Mr. Hof asserts that district court erred when it denied his motion to correct an illegal sentence. Its order should be reversed.

CONCLUSION

Mr. Hof respectfully asks that the district court’s order denying his Rule 35 motion be granted, and that his case be remanded to the district court for resentencing.

Dated this 29th day of January, 2019.

/s/ Kimberly A. Coster
KIMBERLY A. COSTER
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of January, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

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/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

KAC/eas