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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46423-2018
Plaintiff-Respondent,)	
)	ADA COUNTY
v.)	NO. CR-FE-2016-7765
)	
MARK DICKENS FORSYTHE,)	
)	
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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STATEMENT OF THE CASE

Nature of the Case

Mark Dickens Forsythe appeals from the district court's order denying his Idaho Criminal Rule 35(a) motion to correct an illegal sentence. Mindful of controlling authority to the contrary, he contends the district court erred in denying his motion because his sentence is illegal.

Statement of Facts and Course of Proceedings

Mr. Forsythe was charged by Information with possession of a controlled substance and possession of drug paraphernalia, and was charged by Information Part II with being a persistent violator under Idaho Code § 19-2514. (R., pp.15, 32-33, 36.) A jury found Mr. Forsythe guilty of both counts, and he then pled guilty to being a persistent violator. (R., pp.15, 32-33, 36.) The district court sentenced Mr. Forsythe as a persistent violator to an aggregate unified term of fifteen years, with three years fixed. (R., pp.15, 32-33, 36.) Mr. Forsythe appealed from the judgment of conviction, challenging the district court's denial of his motion to suppress, and the Court of Appeals affirmed. *State v. Forsythe*, 2019 WL 1110905 (Ct. App. March 11, 2019) (unpublished).

Mr. Forsythe filed a pro se motion for correction of illegal sentence pursuant to Idaho Criminal Rule 35(a) on August 13, 2018. (R., p.13.) Mr. Forsythe argued his sentence was illegal because he should not have been sentenced as a persistent violator. (R., pp.14-30.) The State filed an objection to Mr. Forsythe's motion arguing Mr. Forsythe was properly sentenced as a persistent violator. (R., pp.33-35.) The district court issued an order on September 17, 2018, denying Mr. Forsythe's Rule 35(a) motion. (R., pp.36-42.) Mr. Forsythe filed a timely notice of appeal on October 9, 2018. (R., pp.43-46.)

ISSUE

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

ARGUMENT

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

A. Introduction

The district court erred in denying Mr. Forsythe's motion to correct an illegal sentence because Mr. Forsythe's 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. Mr. Forsythe Could Not Legally Be Sentenced As A Persistent Violator

Mr. Forsythe raised four arguments in the district court in support of his Rule 35 motion, and he repeats these arguments on appeal. (R., pp.12-25.) First, he contends he could not be legally sentenced as a persistent violator because the persistent violator statute only applies to a third felony conviction and he had more than two prior felony convictions. (R., pp.26-29.) Section 19-2514 provides for an enhanced sentence for "[a]ny person convicted for the third time of the commission of a felony" Mr. Forsythe contends that, under the plain language of this statute, he could not be sentenced as a persistent violator because this was not his third felony conviction. He makes this argument mindful of *State v. Bates*, 63 Idaho 119, 117 P.2d 281 (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." *Id.* at ___, 117 P.2d at 281.

Second, Mr. Forsythe contends 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.16-17.) 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. Forsythe 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.39.) Mr. Forsythe 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. Forsythe contends he could not be subject to the persistent violator enhancement for a repeat violation of the Controlled Substances Act.

Third, Mr. Forsythe contends he cannot be sentenced as a persistent violator because the crime he was charged with (possession of a controlled substance) was not designated as a felony at the outset. He contends his conviction in this case did not constitute a felony until the district court imposed a sentence exceeding that permitted for a misdemeanor. (R., pp.21-24.) The district court rejected this argument, concluding Mr. Forsythe was charged with a felony from the outset because he was charged with possession of methamphetamine, which is punishable by up to seven years in prison. (R., p.40.) 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 could not be sentenced as a persistent violator.

Fourth, Mr. Forsythe contends 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.18-20.) Mr. Forsythe argues it is a constitutional violation for the term of imprisonment to be enhanced, but not the fine. The district court rejected this argument, noting the single case cited by Mr. Forsythe, *State v. Breed*, 111 Idaho 497 (Ct. App. 1986), did not support his position. (R., p.40.) Mindful of the district court’s decision, Mr. Forsythe contends the district court erred.

CONCLUSION

Mr. Forsythe 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 12th day of June, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of June, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
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/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

AWR/eas