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### State v. Herrera Respondent's Brief Dckt. 45547

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 45547
Plaintiff-Respondent,	)	
	)	Canyon County Case No.
v.	)	CR-2014-26736
	)	
RAUL EDGAR HERRERA, aka EDGAR	)	
CANTU,	)	RESPONDENT'S BRIEF
	)	
Defendant-Appellant.	)	

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Issue

Must Herrera's appeal be dismissed as untimely?

Herrera's Appeal Should Be Dismissed Because It Is Untimely

A jury found Herrera guilty of first degree murder, robbery, burglary, second degree kidnapping, and aggravated battery, and the district court imposed concurrent sentences of life, with 35 years fixed, for first degree murder; life, with 30 years fixed, for robbery; 10 years fixed for burglary; life, with 20 years fixed, for second degree kidnapping; and 15 years fixed for aggravated battery. (R., pp.58-59.) Herrera filed a Rule 35 motion for correction of an illegal

sentence, claiming that his sentence for second degree kidnapping was illegal because it exceeded the statutory maximum, and that his sentence for first degree murder was illegal because he believed that the “maximum penalty” the district court was authorized to impose for first degree murder was life, with 10 years fixed. (R., pp.68-70.) At the hearing on Herrera’s Rule 35 motion, the state acknowledged that Herrera’s sentence for second degree kidnapping exceeded the maximum sentence of 25 years permitted by I.C. § 18-4504(2), and the parties stipulated to “adjusting the kidnapping sentence to become a 20-year fixed sentence with no indeterminate time” if the district court determined that the first degree murder sentence was legal. (8/8/17 Tr., p.34, Ls.4-5; p.40, Ls.10-18.) On August 16, 2017, the district court entered an Order Re: Defendant’s Motion for Reconsideration Pursuant to ICR 35, granting Herrera’s motion to correct an illegal sentence as to the sentence for second degree kidnapping, and denying the motion as to the sentence for first degree murder (finding that Herrera’s sentence for first degree murder was legal because the “mandatory ten year fixed sentence required by [I.C.] § 18-4004 is the minimum possible sentence,” not the maximum, and the court was “therefore entitled, in its discretion, to impose any sentence between ten years and life”). (R., pp.150-55.)

At the subsequent hearing for re-sentencing on the second degree kidnapping charge, the parties again stipulated to the imposition of a fixed 20-year sentence. (9/18/17 Tr., p.43, Ls.11-16.) The district court granted the parties’ request and, on October 5, 2017, entered an amended judgment of conviction, amending Herrera’s sentence for second degree kidnapping to 20 years fixed. (R., pp.161-63.) On October 25, 2017, Herrera filed a notice of appeal timely only from the amended judgment of conviction. (R., pp.164-67.)

Mindful of legal authority to the contrary, Herrera nevertheless asserts that the district court erred by denying his Rule 35 motion for correction of an illegal sentence “in regard to his

allegation that the sentence for his murder conviction was unlawful.” (Appellant’s brief, pp.3-4.) This Court lacks jurisdiction to consider Herrera’s appellate challenge to the denial of his Rule 35 motion to correct his sentence for first degree murder because Herrera did not timely appeal from the district court’s order denying that motion.

Idaho Appellate Rule 14(a) requires an appellant to file a notice of appeal within 42 days from the entry of “any judgment or order of the district court appealable as a matter of right in any civil or criminal action.” The requirement of filing a notice of appeal with 42 days of the entry of an order appealable as a matter of right is jurisdictional, and any appeal taken after expiration of the filing period must be dismissed. I.A.R. 21 (failure to file a notice of appeal within time limits prescribed by appellate rules is jurisdictional and requires automatic dismissal of the appeal).

The district court entered its Order Re: Defendant’s Motion for Reconsideration Pursuant to ICR 35, denying Herrera’s Rule 35 motion for correction of his sentence for first degree murder, on August 16, 2017. (R., pp.150-55.) That order was one “made after judgment affecting the substantial rights of the defendant or the state” and was, therefore, an order appealable as a matter of right. I.A.R. 11(c)(9); see also State v. Fuller, 104 Idaho 891, 891-92, 665 P.2d 190, 190-91 (Ct. App. 1983) (order denying Rule 35 motion appealable as matter of right under then existing I.A.R. 11(c)(6), which has since been re-designated I.A.R. 11(c)(9)). Accordingly, if Herrera wished to challenge the court’s order denying his Rule 35 motion for correction of the sentence imposed upon his conviction for first degree murder, it was incumbent upon Herrera to file a notice of appeal within 42 days of the entry of that order. I.A.R. 14(a). Herrera did not do so and, instead, filed his notice of appeal on October 25, 2017 – 70 days after the district court entered the Order Re: Defendant’s Motion for Reconsideration Pursuant to ICR

35. (R., pp.164-67.) Because Herrera failed to file his notice of appeal within 42 days of the order denying his Rule 35 motion, this Court lacks appellate jurisdiction to consider Herrera's challenge to that order. I.A.R. 21.

Herrera did timely file his notice of appeal from the district court's amended judgment of conviction, entered on October 5, 2017. (R., pp.161-67.) For the reasons that follow, however, the timeliness of Herrera's appeal from the amended judgment does not confer jurisdiction on this Court to entertain the issue Herrera raises on appeal – “[w]hether the district court erred by denying [his] Rule 35 motion,” “in regard to his allegation that the sentence for his murder conviction was unlawful.” (Appellant's brief, p.3.)

Idaho Appellate Rule 17(e)(1)(B) states that a notice of appeal from a judgment or order “shall be deemed to include, and present on appeal ... [a]ll final judgments and orders entered prior to the judgment or order appealed from *for which the time for appeal has not expired.*” (Emphasis added). As explained by the Idaho Supreme Court, as used in I.A.R. 17(e)(1)(B), “[t]he phrase ‘for which the time for appeal has not expired’ refers to the ‘orders ... entered prior to the judgment.’” Harrison v. Certain Underwriters at Lloyd's, London, 149 Idaho 201, 204, 233 P.3d 132, 135 (2010) (ellipses in original). Thus, “[t]he time for appeal from those orders must not have expired in order for them to be included in an appeal from the ‘judgment ... appealed from.’” Id. (ellipses in original). As explained above, by the time Herrera filed his notice of appeal from the amended judgment of conviction, the 42-day time limit for filing an appeal from the court's order denying Herrera's rule 35 motion had already expired. Consequently, Herrera's appeal from the amended judgment cannot be deemed to have included the order denying his Rule 35 motion. See Harrison, 149 Idaho at 204, 233 P.3d at 135 (appeal from judgment did not confer jurisdiction on appellate court to consider challenge to pre-

judgment order confirming arbitration award because arbitration award was itself an appealable order and the time for appeal of that order had already expired).

The state anticipates Herrera may attempt to argue that his challenge to the legality of the sentence imposed upon his first degree murder conviction is a direct challenge to the amended judgment of conviction and, therefore, his appeal is timely. Any such argument would be without merit. It is well settled that the entry of an amended judgment that is substantively identical to the original judgment does not enlarge the period for filing an appeal, and the appellate court does not have jurisdiction to address matters unaffected by the subsequent judgment. State v. Ciccone, 150 Idaho 305, 308, 246 P.3d 958, 961 (2010); State v. Payan, 128 Idaho 866, 867, 920 P.2d 82, 83 (Ct. App. 1996). The district court's amended judgment of conviction, entered on October 5, 2017, did not deny Herrera's motion for correction of his sentence for first degree murder; rather, it "reflects a change only to count IV," correcting only Herrera's sentence for *second degree kidnapping*, and "[a]ll other terms and conditions remain the same and effective as of the original judgment." (R., pp.161-63 (underlining omitted).) Because the amended judgment did not deny Herrera's motion to correct his sentence for first degree murder or affect his sentence for first degree murder in any way, the entry of the amended judgment did not enlarge the time in which Herrera was required to file an appeal from the order denying his Rule 35 motion for correction of his sentence for first degree murder in order to challenge the denial of that motion.

Because Herrera's appeal of the district court's Order Re: Defendant's Motion for Reconsideration Pursuant to ICR 35 is not timely, this Court lacks jurisdiction to consider it and Herrera's appeal must be dismissed.

Conclusion

The state respectfully requests this Court to dismiss Herrera's appeal as untimely.

DATED this 6th day of April, 2018.

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General

VICTORIA RUTLEDGE  
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th day of April, 2018, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

BRIAN R. DICKSON  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: [briefs@sapd.state.id.us](mailto:briefs@sapd.state.id.us).

/s/ Lori A. Fleming  
LORI A. FLEMING  
Deputy Attorney General