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IN THE SUPREME COURT OF THE STATE OF IDAHO

MIGUEL SOLANO,)	No. 47287
)	
Petitioner-Appellant,)	Bingham County Case No.
)	CR14-17-23081
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent-Appellee.)	

PETITIONER'S BRIEF

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

JUDGE GEORGE A. SOUTHWORTH
District Judge

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STATEMENT OF THE CASE

Nature of The Case

Mr. Solano appeals the lower court's decision denying his motion to reconsider his sentence. He requests that this Court will reverse the lower court's decision and find that his sentence was illegal or that it warrants reduction.

Statement of the Facts and Course of Proceedings

Mr. Solano has resided in the United States since he was two years old and for the last seven years, he has been a lawful permanent resident. (M.R.¹ at 5-6.) He speaks English, has never returned to his country of birth, and identifies himself as a U.S. citizen. (M.R. at 6.) His parents and all his siblings reside in the United States, with his father and four siblings all U.S. citizens. (*Id.*) The decision of the district court judge, as described below, has triggered immigration consequences for Mr. Solano which makes him eligible for deportation.

On February 19, 2019, Mr. Solano plead guilty to Injury to a Child under Idaho Code §18-1501(1) and was sentenced. (J.O.² at 1.) The district court sentenced Mr. Solano to confinement for a minimum of two years and with a

¹ Motion for Reconsideration of Sentence (M.R.)

² Judgment and Commitment and Order of Probation on Suspended Execution of Judgment (J.O.)

subsequent indeterminate period of confinement for three years. (*Id.*) The court suspended the judgement and then ordered probation with special conditions to include 180 days in Canyon County Jail, with credit 8 days served, and 90 days of discretionary jail time. (J.O. at 2.)

On June 17, 2019, Mr. Solano filed a Motion for Reconsideration of Sentence under both Rule 35(a) and (b) arguing the sentence was illegal or deserving of reduction. (R.O.³ at 2.) The court denied that motion on July 3, 2019. (R.O. at 4.) Mr. Solano timely filed a notice to appeal.

ISSUE PRESENTED

1. Did the judge err in denying Mr. Solano's Rule 35 motion where Mr. Solano's sentence and conditions of probations amount to an illegal sentence and the sentence is exceedingly harsh in Mr. Solano's circumstances?

SUMMARY OF THE ARGUMENT

The district court erred in denying Mr. Solano's Rule 35 motion for two reasons: (1) Mr. Solano's sentence was statutorily illegal and (2) Mr. Solano's

³ Order on Defendant's Motion for Reconsideration (R.O.)

sentence should be reduce because it will result in severe immigration consequences for Mr. Solano that the lower court did not correctly weigh in its sentencing decision.

First, Mr. Solano's conditions of probation, which were part of his sentence, were illegal. Idaho courts have indicated that imprisonment as a term of probation must be based in statutory authority, which is not the case here. Instead, statutes indicate that a term of jail time and a term of prison time may not both be imposed as was done in Mr. Solano's case.

Second, Mr. Solano's sentence would result in his deportation even though his whole family lives in the United States, with all his siblings and father having citizenship. The lower court abused its discretion by not giving these factors greater weight when determining the sentence and accordingly the sentence should be reduced.

For these two reasons this Court should reverse the lower court's ruling.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING MR. SOLANO'S RULE 35 MOTION BECAUSE HIS SENTENCE WAS ILLEGAL AND WARRANTED REDUCTION.

A. Standard of Review

A Rule 35 motion is narrow in scope and allows the court to correct an illegal sentence or a sentence meted out in an illegal manner. I.C.R. 35. Review of a Rule 35 motion is matter of law and this Court may review the matter freely and de novo. *State v. Draper*, 151 Idaho 576, 601, 261 P.3d 853, 878 (2011). Requests to reduce sentences under Rule 35 are considered requests for leniency and are reviewed under an abuse of discretion standard. *Id.*

B. Mr. Solano's Rule 35 motion should have been granted because his sentence was illegal under statutory law.

This court should overturn the lower court's decision because Mr. Solano's sentence is illegal. Idaho Code § 19-2601 permits a sentencing court to commute, suspend, or withhold a judgement and impose probation. Elaborating on that statute, the lower court in this case cited to *Franklin v. State* in its ruling on the motion, correctly stating that it has authority to impose special conditions on that probation. 87 Idaho 291, 392 P.2d 552 (1964). *Franklin* further clarifies that when sentencing a defendant to probation subject to a withheld judgement, imprisonment can only be imposed under clear statutory authority. 87 Idaho at 299, 392 P.2d at 556. Under this reasoning, the plurality in *Franklin* determined that there was no

statutory authority under I.C. § 19-2601 to issue incarceration as a special condition of probation after withholding a judgement. *Id.*

This Court subsequently rejected the holding of *Franklin*, finding that imprisonment could be a condition of probation, choosing to give a liberal reading to I.C. § 19-2601. *State v. Wagenius*, 99 Idaho 273, 279, 581 P.2d 319, 325 (1978). However, this Court still based that decision in statutory authority. *Id.* In *Wagenius*, the Court recognized that there was no similar holding when suspending sentences but assumed in dicta that imprisonment was permissible because courts had accepted those sentences in other cases. *Id.* However, in those cited cases, courts reviewed the sentences without opposition from briefing parties on this issue. *Id.* Mr. Solano knows of no case law that has explicitly extended the decision in *Wagenius* to the suspension of sentences.

Despite the lack of case law, the Idaho legislature seemed to contemplate that in some suspended cases, imprisonment would be an allowable condition of probation. *See* I.C. § 19-2521(1)(a). However, there is no indication that there is an unlimited authority to impose imprisonment as a special condition of probation in cases of a suspended sentence. Other statutes place limits on when imprisonment can be imposed as a special condition of probation.

One such example is Idaho Code §18-1501(1). There, the Idaho legislature has restricted the possible sentence for an injury to a child involving risk of great bodily harm to “imprisonment in the county jail not exceeding one (1) year, or in the state prison for not less than one (1) year nor more than ten (10) years.” *Id.* The operative word here is “or.” This Court has held that “the language of the statute is to be given its plain, obvious, and rational meaning. If the language is clear and unambiguous, there is no occasion for the court to resort to legislative history or rules of statutory interpretation.” *State v. Beard*, 135 Idaho 641, 646, 22 P.3d 116, 121 (Ct. App. 2001). There is no mention of suspended sentences, and the face of the statute indicates that a sentence may only contain provision for incarceration in either the county jail *or* the state prison.

Tying this statute to Idaho Code § 19-2601(2), which governs suspended sentences, there does not appear to be statutory authority to impose imprisonment as a special condition if it would result in a sentence both in county jail and state prison. This contemplates a situation outside the scope of *Wagenius*. When the court withholds judgement, the court does not impose a specific length or type of punishment outside requirements for probation. So, it would be nearly impossible to impose an impermissible term of imprisonment as long as the judge stays within

the guidelines. This is not the case for a suspended judgement, where the sentence includes both a specific judgement and terms of probation which, when added together, may be in violation of statutory guidelines.

Turning to the case at bar, Mr. Solano was given an impermissible sentence. Mr. Solano was sentenced to an aggregate of 5 years in state prison, with an aggregate of 270 days in the county jail for his charge of injury to a child. If the court wanted to impose the 5 years in prison, though suspended, there is no statutory authority for it to also impose time in the county jail. The court erred in not correcting this sentence by only imposing the time in the county jail. Since Mr. Solano has already served a large portion of his jail sentence, the only feasible correction is to eliminate the suspended sentence of state prison time, or Mr. Solano would be punished twice for the same crime.

C. Even if Mr. Solano's sentence was not illegal, it warrants reduction due to the severe immigration consequences it will have on Mr. Solano.

The lower court failed to properly weigh Mr. Solano's immigration consequences in determining his sentence. Idaho courts hold:

A term of confinement is reasonable to the extent it appears necessary, at the time of sentencing, to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation and retribution. These criteria also apply to

rulings on motions to reduce sentences under Rule 35. *State v. Lopez*, 106 Idaho 447, 450, 680 P.2d 869, 872 (Ct. App. 1984). Such a motion is essentially “a plea for leniency” which may be granted if “the sentence originally imposed was, for any reason, unduly severe.” *Id.*

The lower court abused its discretion when it denied Mr. Solano’s request for a reduced sentence because Mr. Solano’s immigration consequences will make his sentence harsher than what may have been originally anticipated by the court and unduly severe. The lower court did not properly weigh these consequences in rejecting Mr. Solano’s Rule 35 motion.

Due to Mr. Solano’s immigration status, this felony conviction may result in his deportation. Under 8 U.S.C. §1227(a)(2)(A)(iii), any alien who is convicted of an aggravated felony at any time after admission is deportable. Statutes further define “aggravated felony” as a “crime of violence with term of imprisonment of one year or more.” 8 U.S.C. §§1101(a)(43), 16. Any aggravated felony makes a non-citizen removable and eliminates relief from removal including adjustment of status, cancellation of removal, and voluntary departure. *Id.* This means that under Mr. Solano’s current sentence, he is ineligible for relief through the immigration

court and will be deported from the United States, without realistic possibility of returning.

The lower court erred in not properly weighing these consequences. Mr. Solano has been a lawful permanent resident of the United States for the past seven years. He has resided in the United States since he was two years old. He speaks English and identifies as a U.S. citizen. Mr. Solano's immediate family all resides in the United States, and his father and four siblings have U.S. citizenship. His mother also resides in the United States.

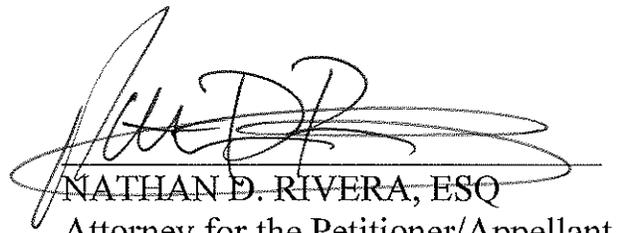
Mr. Solano has no ties to his country of birth and the sentence will effectively remove him from his entire immediate family. This makes Mr. Solano's sentence unreasonably harsh. Mr. Solano is not only facing incarceration, but also separation from the country he calls home and separation from his family. This far outweighs the time in jail and probationary period which Mr. Solano would be subject to if the suspended sentence was not activated. Including a portion of the sentence that may never be served, but would still result in severe immigration consequences, is exceedingly harsh and does not reflect a proper weighing of all Mr. Solano's characteristics in sentencing.

The lower court instead should have removed the fixed and indeterminate portion of Mr. Solano's sentence, which would accomplish the same goal the court intended at sentencing. This would allow Mr. Solano a fair chance to defend his residency status in Immigration Court, as he would not be barred from bringing defenses that he could not otherwise bring with an aggravated felony on his record. This Court should correct the abuse of discretion by the lower court and grant Mr. Solano's request for a reduction of sentence.

CONCLUSION

Based on the evidence and argument presented herein, Mr. Solano respectfully requests that this Court overturn the decision of the district court.

DATED this 19th day of August, 2019.


NATHAN D. RIVERA, ESQ
Attorney for the Petitioner/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have on this 11th day of Nov. 2019, served two true and correct copies of the foregoing PETITIONER'S BRIEF, by placing the copies in the United States mail, postage prepaid, addressed to:

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