IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41521

STATE OF IDAHO,	)	**2015 Unpublished Opinion No. 436**
	)	
Plaintiff-Respondent,	)	**Filed: March 26, 2015**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
WESLEY WAYNE AUSTIN,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bingham County. Hon. Jon J. Shindurling, District Judge.

Order denying I.C.R. 35 motion, affirmed; order denying motion to dismiss for lack of jurisdiction and to dismiss warrant, affirmed.

Wesley Wayne Austin, Oakdale, Lousiana, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Wesley Wayne Austin appeals from the district court's order denying his Idaho Criminal Rule 35 motion for correction of an illegal sentence, and from the order denying his motion to dismiss for lack of jurisdiction and motion to dismiss warrant. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2001, pursuant to a plea agreement, Austin pled guilty to ten counts of felony issuance of insufficient funds check. *See* Idaho Code § 18-3106. The plea agreement provided:

> Pursuant to Rule 11(d)(1)(B) and (D) of the Idaho Rules of Criminal Procedure, [the] Deputy Prosecuting Attorney for the County of Bingham, State of Idaho, and [the] attorney for the Defendant, WESLEY AUSTIN, the parties are entering into this agreement after considerable discussions and negotiations indicate that Defendant will enter a guilty plea to the following counts of Felony Insufficient Funds Check, each violations of Idaho Code § 18-3106 (b): Count XXI, Count XXII, Count XXVI, Count XXXVII, Count XXVII, Count XXVIII, Count XXX, Count XXXIV, Count XXXIII and Count XXXI.

In consideration of the following, the parties agree that:

l. All of the forgoing counts shall run concurrently, pursuant to Rule 11(d)(l)(D), Idaho Criminal Rules. Defendant shall pay, during the period of any probation, all restitution on any and all accounts charged or checks, as well as any outstanding checks or amounts uncharged which were owing to various parties during the course of his business operation of Austin Farms, Inc. between August and November, 2000.

Defendant enters this plea pursuant to *U.S. V. Alford*, on the basis that he did not have the requisite intent to defraud to be found guilty of the charge. He does, however, acknowledge that the State has substantial evidence of several insufficient funds checks which he wrote, and that there is considerable possibility he could be convicted by a jury of his peers if the matter were to proceed to trial on all charges.

2. Defendant will successfully complete and follow all recommended terms of probation, and other conditions that may be imposed by the Court or the probation department.

3. Defendant reserves the right and intends to ask the Court for probation and withheld judgment; the State reserves the right to make their recommendations following a review of the presentence investigation report. The parties recommendations as to sentencing are not binding on the Court pursuant to Rule 11(d)(l)(B), Idaho Criminal Rules.

4. The parties further understand that Defendant will ask the Court for a release pending sentencing at the time of his entry of plea in order to facilitate his search and location of employment, and to begin working on paying back restitution and other matters owed.

5. The State shall agree to dismiss all other outstanding charges and counts, and further agrees not to pursue any charges and counts of which they presently have knowledge, or reasonably could obtain knowledge to the date of plea. Defendant understands that he may be investigated by federal authorities, and that this agreement binds only the State of Idaho and not the United States of America.

6. The State shall agree to allow credit for time served from the date of Defendant's incarceration, November 20, 2000. The State further agrees not to oppose Defendant's request for a withheld judgment, if qualified, and in any event, the State agrees to recommend no more than a rider or retained jurisdiction. The State may also ask for local incarceration.

7. The parties further understand and agree that Defendant's background, criminal record, or lack thereof, employment and educational opportunities and other circumstances may be considered by the Court in passing sentence in this matter, within the parameters of this agreement. Further, Defendant may be entitled to consideration under Idaho Code §19-2601(3) and §19-2604. The parties agree that the Court should review the usual rationales and criteria for sentencing, including Defendant's rehabilitations, as well as restitution to the victims as important considerations in this case.

8. The Defendant also states that he is aware of his absolute right to plead not guilty and persist in that plea; that he has a right to be tried by a jury and at

> that at trial he has a right to the assistance of counsel. At trial he has a right to require the State to prove the entire case against him beyond a reasonable doubt, that he has the right not to testify against himself or not to be compelled to incriminate himself. Further, at trial, he would have the right to confront and cross-examine witnesses in his own behalf.
>
> 9. The Defendant and his attorney both state that this agreement constitutes the entire agreement between the Defendant and the State of Idaho, and that no other promises or inducements have been made, directly or indirectly, by any agent of the State of Idaho, including the prosecuting attorney, concerning any plea to be entered in this case. In addition, the Defendant states that no person has, directly or indirectly, threatened or coerced the Defendant to do, or refrain from doing, anything in connection with any aspect of this case including entering a plea of guilty.
>
> 10. Counsel for the Defendant states that he has read this agreement, has been given a copy of said agreement for his file, has explained said agreement to his client, and states that, to the best of his knowledge and belief, the Defendant understands this agreement.
>
> 11. The Defendant states that he has read this agreement, has had said agreement read to him, has discussed said agreement with his attorney and understands this agreement.
>
> This Plea Agreement is made pursuant to Idaho Criminal Rule 11(d)(l)(B) and (D), and is entered into with full consideration of the circumstances of the Defendant's background and present circumstances.
>
> 12. Further, the parties acknowledge that the parties' respective recommendations as to sentencing are not binding on the Court. The parties stipulate that the various counts that Defendant pleads to, as well as the fact that those counts would run concurrently, are binding on the Court under Idaho Criminal Rule 11(d)(l)(D).

At the change of plea hearing, the district court reviewed the plea agreement with Austin and informed him that the agreement was non-binding. Austin indicated that he understood, and entered a plea of guilty on each count. Subsequently, the district court sentenced Austin on each count to "serve a minimum of two years and a maximum of three years." The Court ran the counts consecutively. The Court suspended the sentence and placed Austin on probation for a period of ten years. However, the judgment of conviction indicated that each of the sentences consisted of two years determinate and three years indeterminate. Austin appealed. In 2001, while Austin's appeal was pending, the district court filed an amended judgment of conviction that restated the sentences as three years with two years determinate on each count, consecutive. In an unpublished opinion, this Court ordered the appeal dismissed as untimely.

In 2010, the Department of Correction filed a report of probation violation stemming from federal charges. The district court issued a no-bond warrant, which was served on Austin

while he remained in federal custody. In April 2013, Austin filed a Rule 35 motion alleging his sentence was illegal because the district court was required to run the counts concurrently pursuant to the plea agreement. The district court denied the motion. Austin timely appealed. Subsequently, Austin filed a motion to dismiss the warrant stemming from the alleged probation violation, and a motion to dismiss asserting the district court was without jurisdiction over him. The district court denied his motions. Austin filed an amended notice of appeal.

II.
ANALYSIS

A. Plea Agreement

On appeal, Austin argues that his sentence is illegal and should be vacated. Pursuant to Rule 35, the district court may correct an illegal sentence at any time. In an appeal from the denial of a motion under Rule 35 to correct an illegal sentence, the question of whether the sentence imposed is illegal is a question of law freely reviewable by the appellate court. *State v. Josephson*, 124 Idaho 286, 287, 858 P.2d 825, 826 (Ct. App. 1993); *State v. Rodriguez*, 119 Idaho 895, 897, 811 P.2d 505, 507 (Ct. App. 1991). The Idaho Supreme Court has reviewed the parameters of Rule 35:

> Therefore, the term "illegal sentence" under Rule 35 is narrowly interpreted as a sentence that is illegal from the face of the record, i.e., does not involve significant questions of fact or require an evidentiary hearing. This interpretation is harmonious with current Idaho law. As this Court recently noted in *State v. Farwell*, 144 Idaho 732, 735, 170 P.3d 397, 400 (2007), Rule 35 is a "narrow rule." Because an illegal sentence may be corrected at any time, the authority conferred by Rule 35 should be limited to uphold the finality of judgments. Rule 35 is not a vehicle designed to reexamine the facts underlying the case to determine whether a sentence is illegal; rather, the rule only applies to a narrow category of cases in which the sentence imposes a penalty that is simply not authorized by law or where new evidence tends to show that the original sentence was excessive. *See State v. Arthur*, 145 Idaho 219, 223, 177 P.3d 966, 970 (2008).

State v. Clements, 148 Idaho 82, 86, 218 P.3d 1143, 1147 (2009).

Austin argues his sentence is illegal because the district court failed to follow the plea agreement. The plea agreement references Idaho Criminal Rule 11(d)(1)(B) which is the non-binding subsection as well as subsection (D) which is the binding subsection for plea agreements. At the time Austin was sentenced in 2001, I.C.R. 11(d) provided:

> **Plea agreement procedure.** (1) In general. The prosecuting attorney and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement, which may include a waiver of the defendant's right to appeal the judgment and sentence of the court, that upon the entering of a plea of guilty to a charged offense or to a lesser or related offense, the prosecuting attorney will do any of the following:
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> (A) move for dismissal of other charges; or
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> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
>
> (C) agree that a specific sentence is the appropriate disposition of the case; or
>
> (D) agree to any other disposition of the case.
>
> The court may participate in any such discussions.
>
> (2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. If the agreement is of the type specified in subdivision (d)(1)(A), (C) or (D), the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report. If the agreement is of the type specified in subdivision (d)(l)(B), the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea.
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> (3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will implement the disposition provided for in the plea agreement.
>
> (4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court, or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the defendant's plea, and advise the defendant that if the defendant persists in the guilty plea the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

In *State v. Wilson*, 127 Idaho 506, 512-13, 903 P.2d 95, 101-02 (Ct. App. 1995), this Court summarized the distinction between the binding and non-binding provisions:

> If the plea agreement falls under Idaho Criminal Rule 11(d)(1)(A), (C) or (D), the district court must advise the defendant whether it accepts or rejects the agreement. I.C.R. 11(d)(3) and (4). If the court rejects the agreement, it must advise the defendant of this in open court and allow the defendant the opportunity to withdraw the plea. I.C.R. 11(d)(4). On the other hand, if the plea agreement falls under Rule 11(d)(1)(B), the district court has no duty to inform the defendant whether it accepts or rejects the proposed sentence and is in no way bound by the

> sentencing recommendation. I.C.R. 11(d)(2); *State v. Kingston*, 121 Idaho 879, 881, 828 P.2d 908, 910 (Ct. App. 1992).

In denying Austin's Rule 35 motion, the district court concluded that the plea agreement, even if originally intended to be binding in certain respects, was a non-binding agreement based on the colloquy at the change of plea hearing.[1]

The district court relied on *State v. Whitehawk*, 117 Idaho 1022, 793 P.2d 695 (1990). In that case the defendant entered into a plea agreement with the State under former I.C.R. 11(d)(1)(C), or in the alternative subsection (A) or (D). The Supreme Court held that based on the colloquy at the change of plea hearing, the agreement was to be treated as an I.C.R. 11(d)(1)(B) agreement, and thus the district court did not have a duty to inform the defendant of the right to withdraw the plea if the court rejected the agreement. The Court reasoned:

> As we view the facts of this case, in light of these rules and of the colloquy between the trial court and Whitehawk at the time Whitehawk pled guilty, the trial court and the parties, in effect, treated sections 4, 5 and 6 of the agreement as a (B) agreement instead of a (C) agreement. This is the only meaning we can give to the statements of the trial court at the time the plea was tendered that Whitehawk would not be allowed to withdraw his plea after it was accepted. Not only did Whitehawk agree that he would not be allowed to withdraw his pleas, but both the prosecutor and the defense attorney confirmed this understanding.

Whitehawk, 117 Idaho at 1026, 793 P.2d at 699. The Court further noted that if the plea was taken under subsection (A), (C), or (D), the Court would have been required to notify Whitehawk that if the agreement was rejected that he could withdraw his guilty plea. The Court also explained:

> Only if the agreement is treated as a (B) agreement was it proper for the trial court to advise Whitehawk that he had no right to withdraw his plea if the trial court did not accept the sentence specified in sections 4, 5 and 6 of the agreement. Since the parties acquiesced in this treatment, we are unwilling to treat the agreement as a (C) agreement. The trial court was not bound by the

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[1] The district court also concluded that Austin's motion to correct an illegal sentence failed because the alleged failure to follow an agreement is, in reality, a claim that the sentence was imposed in an illegal manner, as opposed to an illegal sentence. Given our conclusion that the plea agreement was modified at the change of plea hearing, we will assume that the failure to follow a binding plea agreement falls under the parameters of Idaho Criminal Rule 35 as an illegal sentence.

sentencing recommendations of the (B) agreement and was not required to give Whitehawk an opportunity to withdraw his guilty plea.

Id.

In the present case, at the change of plea hearing, the district court discussed with Austin the following:

> Court: Do you understand what you're charged with in those counts?
> Austin: Yes, Your Honor.
> Court: Tell me what you understand that to be.
> Austin: I'm charged with writing an insufficient check in an attempt to commit fraud.
> Court: All right. Do you understand what the possible penalties are for those charges?
> Austin: Yes, Your Honor.
> Court: Tell me what you understand them to be.
> Austin: I understand them to be a one to three year sentence in the state penitentiary with fines of $50,000 on each count.
> Court: All right. You can also be required to pay restitution.
> Austin: Yes, Your Honor.
> Court: *And you understand that those ten counts can run consecutively or they can run concurrently?*
> Austin: *Yes, Your Honor.*
> Court: Now I'm going to take just a moment and go through the plea agreement so that we all understand what it is. The plea agreement provides that you will plead guilty to those ten counts pursuant to *United States v. Alford*.
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> . . . .
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> Court: You will reserve the right, pursuant to the plea agreement, to ask the Court for probation, but acknowledge that the *Court is taking your guilty plea pursuant to Rule 11(d)(l)(B), which means that the Court is not bound by the plea agreement and that you will not have the right to withdraw your guilty plea if the Court deviates from the plea agreement.*
> *Do you understand that?*
> Austin: *Yes, Your Honor.*
>
> . . . .
>
> Court: The plea agreement, in Paragraph 8, states that you know, that you fully understand the nature of what you're doing and the rights that you are giving up by pleading guilty.
> Paragraph 9 indicates that this is the entire agreement between you and the State and that you have not been coerced. And we will go through some of those matters in more detail in a moment.

> Paragraph 10 says you have read this, that your attorney has explained to you what it all means, and that you understand the agreement.
> Paragraph 11 says basically the same thing. It further provides that this agreement is pursuant to Rule 11(d)(1)(B) and (D).
> And Paragraph 12, in essence, says that as part of the agreement that the recommendation will be that the sentence on the counts run concurrently.
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> . . . .
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> Court: *Do you understand--and this is very important--that this agreement is made pursuant to Rule 11(d)(1)(B),* which means that even though the State will make certain recommendations to the Court at the time of sentencing, the Court is not bound by those recommendations and may impose a sentence as it deems proper once it has received the Presentence Investigation Report?
>
> Austin: Yes, Your Honor.
>
> Court: Do you further understand that if the Court deviates from the terms of the plea agreement, that you would not necessarily have the right to withdraw your guilty plea to the ten counts to which you plead?
>
> Austin: Yes, Your Honor.

(Emphasis added.) While rejection of a binding plea agreement requires the court, under Rule 11(d)(1)(D), to "afford the defendant the opportunity to then withdraw the defendant's plea." At the time Austin was advised by the court that the plea was non-binding on the court, he had not entered his plea.

Though at one point the district court referenced subsection (D) in the agreement, the court's review of the plea agreement indicates that it understood and was applying the agreement as a non-binding agreement. Thus, as in *Whitehawk*, the plea was thereafter entered with the understanding that Austin could not withdraw the guilty plea if the court deviated from the agreement. Further, Austin affirmatively acknowledged that he understood the counts could be run consecutively and that he would not be allowed to withdraw his guilty plea. As stated in *Whitehawk*, the parties "acquiesced" in this treatment. Consistent with *Whitehawk*, the district court properly concluded that Austin's sentence was not illegal because the sentence conformed to the plea agreement as understood and accepted at the entry of guilty pleas.

B. Amended Judgment

Austin argues that the district court erred in denying his motions to dismiss because the court did not have jurisdiction to resentence him in October 2001 because he was not present for the resentencing.[2] Austin relies on law indicating a criminal defendant has a right to be present at sentencing. *See Lopez v. State*, 108 Idaho 394, 396, 700 P.2d 16, 18 (1985) ("The statute and rule establish that a defendant's presence at the time of sentencing is mandatory, not discretionary."); *see also* I.C. § 19-2503; I.C.R. 43(a). However, the district court did not resentence Austin. The court corrected the judgment to reflect the pronounced sentence. At the sentencing hearing, the district court sentenced Austin, on each count, to three years with two years determinate. The judgment did not reflect this sentence, instead listing each count as five years with two years determinate. "Under Idaho law, the only legally cognizable sentence in a criminal case is the actual oral pronouncement in the presence of the defendant. The legal sentence consists of the words pronounced in open court by the judge, not the words appearing in the written order of commitment." *State v. Allen*, 144 Idaho 875, 877-78, 172 P.3d 1150, 1152-53 (Ct. App. 2007) (quoting *State v. Wallace*, 116 Idaho 930, 932, 782 P.2d 53, 55 (Ct. App. 1989)) (quotation marks omitted). "If an order of commitment does not accurately represent the court's oral sentence pronouncement that constitutes the judgment, it is manifestly proper to correct the error under Rule 36 so the written expression is consistent with that judgment."[3] *Wallace*, 116 Idaho at 932, 782 P.2d at 55. The district court amended the judgment to correctly reflect the pronounced sentence pursuant to Rule 36, and Austin's presence was not required.

Austin argues that it was unclear what the sentence was when pronounced at sentencing. The district court stated as to the first two counts that Austin would "serve a minimum of two years and a maximum of three years." The court then indicated that for every other count Austin would serve "a minimum of two and a maximum of three years." Austin claims these sentences are ambiguous because there is no express indication of what the determinate time would be, and

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[2] Austin also argued below that the warrant should be dismissed pursuant to the Interstate Agreement on Detainers Act (IAD). The district court found that the IAD did not apply to probation violations. Austin has not challenged this conclusion on appeal.

[3] Idaho Criminal Rule 36 allows for "[c]lerical mistakes in judgments . . . arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders."

as to the remaining counts it is unclear what "minimum of two" means. The district court's sentence is not ambiguous. The court sentenced Austin to a minimum of two years, which is the determinate portion of Austin's sentence. The maximum of three years, when subtracting the determinate two years, leaves one year indeterminate. Further, the court omitting "years" when stating "minimum of two" makes the sentence no less clear, as plainly the two refers to two years.

In ruling on the Rule 35 motion, the district court stated that when it modified the written judgment it had authorization to do so under Rule 35 to correct the illegal sentence as written. Though the judgment facially listed a sentence that would have been illegal, Austin's sentence was not illegal because the oral pronouncement controlled. Therefore, the district court did not require the authority of Rule 35 to correct Austin's sentence. Instead, the district court had the authority to correct the clerical error in Austin's written judgment. Even so, the court could do so without the presence of the defendant, contrary to Austin's claims.

III.
CONCLUSION

Austin's sentence does not deviate from the modified plea agreement, and the district court had properly corrected the judgment to reflect the pronounced sentence. Therefore, the district court's orders denying Austin's Rule 35 motion, motion to dismiss for lack of jurisdiction, and motion to dismiss warrant are affirmed.

Chief Judge MELANSON **CONCURS.**

Judge LANSING, **CONCURRING IN THE RESULT**.

I concur with the majority opinion except as to Section II(A). As to that section, I concur in the result but do not join in the majority's analysis.

Austin's plea agreement was unusual in that parts of the sentencing terms were binding on the court and parts were not. In paragraph one, the parties unequivocally agreed that the sentences for all counts "shall run concurrently, pursuant to Rule 11(d)(1)(D), Idaho Criminal Rules." Thus, if the court rejected that term, it was required to "advise the defendant personally in open court . . . that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw the defendant's plea, and advise the defendant that if the defendant persists in the guilty plea the disposition of the case may be less favorable to the defendant than

that contemplated by the plea agreement." Idaho Criminal Rule 11(d)(4).[1] Paragraph twelve of the plea agreement provided that all *other* components of the parties' sentencing recommendations were not binding on the court, but that paragraph reiterates that "the fact that those counts would run concurrently, are binding on the court under Idaho Criminal Rule 11(d)(1)(D)."

In my view, a court's misstatement of the terms of an unambiguous plea agreement, even if the parties do not object, does not *ipso facto* alter the agreement. Moreover, the court's colloquy with Austin at his change of plea hearing, which is quoted in the majority opinion, was not clearly and unequivocally inconsistent with the plea agreement so as to put Austin on notice that by answering affirmatively to the court's questions, he was somehow amending the detailed and unambiguous written plea agreement that he had entered into with the advice of counsel. I will address each of the portions of that colloquy that are italicized in the majority opinion, which the majority holds demonstrate that the plea agreement was transformed from one that partially bound the court to an entirely non-binding one.

First, Austin answered affirmatively when the court asked, "And you understand that those ten counts can run consecutively or they can run concurrently?" However, that question came after a series of questions in which the court was reviewing with Austin the maximum possible penalties allowed by statute for the charges to which he was pleading guilty. The question could well have been understood by Austin and the other participants in the hearing as continuing to refer to the maximum possible penalty under the Idaho statutes, which would indeed allow the court to impose consecutive sentences. It is not clear that in that question the court was overlooking or attempting to alter the binding term of Austin's plea agreement.

Next, the court asked if Austin understood that the court was "taking your guilty plea pursuant to Rule 11(d)(1)(B), which means that the court is not bound by the plea agreement and that you will not have the right to withdraw your guilty plea if the court deviates from the plea agreement." As most of the sentence terms were not agreed upon by the parties and not binding on the court, that statement again would not necessarily have alerted Austin that his affirmative response would be deemed an acquiescence to an amendment of his carefully negotiated written plea agreement.

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[1] Throughout this opinion, reference is made to the version of I.C.R. 11 that was in effect when Austin was sentenced in 2001.

Lastly, the court said, "Do you understand--and this is very important--that this agreement is made pursuant to Rule 11(d)(1)(B), which means that even though the State will make certain recommendations to the Court at the time of sentencing, the Court is not bound by those recommendations and may impose a sentence as it deems proper once it has received the Presentence Investigation Report?" Again, this statement by the court is not contrary to the plea agreement since most of the sentence terms, including the length of any fixed or indeterminate term, and whether the court would retain jurisdiction or place the defendant on probation, had not been agreed upon by the parties, and the State's recommendations were not binding on the court.

It is apparent from the colloquy that, far from attempting to extract from Austin acquiescence in a modification of the plea agreement, the court had simply overlooked the fact that the plea agreement included one binding term. At no point in the colloquy did the court expressly refer to, much less reject or seek amendment to, the unambiguous binding term that Austin's sentences would run concurrently. Further, at no point is it apparent that Austin understood that he was acquiescing to such an amendment.

The effect of the district court's decision in denying Austin's Rule 35 motion was that Austin's partially binding plea agreement became non-binding via the colloquy at the change of plea hearing. That approach allows a trial court's ambiguous misstatement of the terms of a carefully negotiated, unambiguous plea agreement to rewrite the agreement if the defendant does not immediately contest or seek clarification of the court's remarks. In this case, according to the district court's decision below, which is affirmed by the majority, the district court's misunderstanding of the plea agreement, and Austin's failure to understand that the court had misunderstood, had profound consequences for Austin. It transformed his plea agreement from one which limited his sentencing risk to a maximum of three years in prison to one that magnified that risk ten-fold, to thirty years. And the actual sentences imposed cumulated to a fixed term of nearly seven times, and a unified term of ten times, the maximum that Austin had agreed to risk.

Plea agreements are essentially bilateral contracts between the prosecutor and the defendant, *State v. Guess*, 154 Idaho 521, 524, 300 P.3d 53, 56 (2013), and in construing and enforcing plea agreements, contract law principles generally apply. *State v. Longest*, 149 Idaho 782, 785, 241 P.3d 955, 958 (2010); *Dunlap v. State*, 141 Idaho 50, 63, 106 P.3d 376, 389

(2004); *see also Puckett v. United States*, 556 U.S. 129, 137 (2009) ("Although the analogy may not hold in all respects, plea bargains are essentially contracts."). I know of no principle of contract law that would allow a party's contract to be fundamentally altered by a trial court's ambiguous misstatement of its terms in the presence of the parties.

The decision upon which the majority relies, *State v. Whitehawk*, 117 Idaho 1022, 793 P.2d 695 (1990) *affirming State v. Whitehawk*, 116 Idaho 827, 780 P.2d 149 (Ct. App. 1989)[2] is distinguishable and does not support this modification of Austin's plea agreement. In that case, the written plea agreement specified that the trial court would withhold judgment and place the defendant on probation. It also expressly stated that if after receiving a psychological examination report and presentence investigation report the court determined that the defendant presented a risk to society or was a pedophile, the court would not be bound by the sentencing limitations in the plea agreement. At the change of plea hearing, the court recounted these terms and then told the defendant that he would not be allowed to withdraw the guilty plea even if the court rejected the binding term of the agreement. The defendant stated that he understood this. However, shortly *before* this colloquy took place between the court and the defendant, the prosecutor and defense counsel had restated the plea agreement in terms somewhat different from the written terms. According to the Court of Appeals opinion, before the court's colloquy with the defendant:

> [T]he prosecutor wanted to make his understanding clear that the guilty plea, once entered, could not be withdrawn in the event the court determined from the reports submitted to it, that Whitehawk "presents a risk of danger to the public at large, or is a pedophiliac." The prosecutor inquired whether his understanding was correct. Defense counsel replied that it was. He said, "We intend by the agreement to have the matter disposed of once and for all by this hearing and by this agreement."

Whitehawk, 116 Idaho at 829, 780 P.2d at 151. Thus, *before* the court's statements to the defendant indicating that the plea agreement was non-binding, the prosecutor and the defense attorney had both already acknowledged that it was non-binding in that the defendant would not

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[2] The Idaho Supreme Court's decision in *Whitehawk* is a brief opinion in which the Supreme Court stated that "we concur with the opinion of the Court of Appeals, but offer a further explanation as to the basis of the decision to affirm the sentence." The Supreme Court's opinion thereafter reproduces the written plea agreement and includes that Court's further analysis.

be allowed to withdraw his guilty plea even if the court refused to grant a withheld judgment. The trial court then, in its colloquy with the defendant, confirmed that the defendant understood and accepted that clarification. After receiving the presentence investigation report and a psychological evaluation, the district court ultimately concluded that Whitehawk was a pedophile and posed a risk to society and thereupon imposed sentence without granting probation. Thus, Whitehawk's sentence was not inconsistent with either the written plea agreement or counsel's clarification of the written agreement at the change of plea hearing.

The circumstances presented in *Whitehawk* are very different from those presented here. In *Whitehawk*, it was the parties, not the court, who modified or clarified the written terms by their remarks at the change of plea hearing. In *Whitehawk*, both attorneys expressly agreed to the clarified terms, whereas in the present case neither attorney acknowledged any modification. In *Whitehawk* the statements orally clarifying the written agreement at the plea hearing were clear and unambiguous whereas, in Austin's case, the judge's comments at the plea hearing were sufficiently ambiguous that they may not have alerted either Austin or the attorneys that the court was misstating the terms of the written agreement. Lastly, in *Whitehawk*, the ultimate sentence was entirely consistent with even the written plea agreement. Thus, *Whitehawk* does support a proposition that a trial court may profoundly alter the terms of an unambiguous written plea agreement simply by misstating those terms in open court, so long as neither the attorneys nor the defendant objects to the court's comments.

Although the trial court here was certainly entitled to reject Austin's plea agreement that called for no more than concurrent sentences for ten separate felonies, it was not entitled to do so without first giving Austin an opportunity to withdraw his guilty plea pursuant to I.C.R. 11(d)(4). Thus, when the court imposed consecutive sentences, it did so in violation of Austin's plea agreement.

Because I would hold that the district court's remarks did not alter the terms of the plea agreement, I must also determine whether Austin's motion was timely to raise this challenge; I conclude that it is not. The time frames in which motions to alter a sentence may be filed are governed by Idaho Criminal Rule 35. A motion challenging an illegal sentence may be filed "at any time," I.C.R. 35(a), but a motion to correct a sentence imposed in an illegal manner or a motion to reduce a sentence as a matter of leniency may be filed only at one of three times: (1) "within 120 days after the filing of a judgment of conviction," (2) "within 120 days after the

court releases retained jurisdiction," or (3) "within fourteen (14) days after the filing of the order revoking probation." I.C.R. 35(b). Austin's motion, filed in April 2013, was not timely from either his original judgment of conviction or the amended judgment entered in October 2001. And notwithstanding his imprisonment for other convictions in other cases, Austin's probation in the present case has never been revoked. Therefore, his motion was not filed within fourteen days of a revocation order. Accordingly, the present motion is time-barred by I.C.R. 35(b) unless it is a motion to correct an illegal sentence and therefore governed by I.C.R. 35(a).

Austin asserts that his motion is one seeking correction of an illegal sentence. I conclude, however, that Austin's sentences, while contrary to the plea agreement, are not "illegal." An illegal sentence is one that is contrary to statute or other applicable law. *State v. Alsanea*, 138 Idaho 733, 745, 69 P.3d 153, 165 (Ct. App. 2003); *State v. Lee*, 116 Idaho 515, 516, 777 P.2d 737, 738 (Ct. App. 1989); *see also Hill v. United States*, 368 U.S. 424, 430 (1962) (stating that a sentence is illegal when the punishment is "in excess of that prescribed by the relevant statutes," where "multiple terms were . . . imposed for the same offense," or where "the terms of the sentence itself [were] legally or constitutionally invalid in any other respect"); *State v. Clements*, 148 Idaho 82, 86, 218 P.3d 1143, 1147 (2009) (suggesting that an illegal sentence is one "not authorized by law");[3] *State v. Mendenhall*, 106 Idaho 388, 393, 679 P.2d 665, 670 (Ct. App. 1984) (holding that where a statute required a sentence to be imposed consecutively but a concurrent sentence was imposed in contravention of the statute, the sentence was illegal and could be remedied as such). Austin's sentences are not in excess of that allowed by statute or violative of the constitution or other applicable law. Rather, they are defective because they are contrary to the plea agreement. In my view, this means that the sentences are not "illegal" but that they were imposed in an illegal manner. Federal authority regarding an analogous federal rule supports this conclusion. *See generally United States v. Stevens*, 548 F.2d 1360, 1362 (9th Cir. 1977) (in a case applying an analogous federal rule, the district court was authorized to amend a sentence that was inconsistent with a binding plea agreement because "the sentence was imposed in an illegal manner; it was not an illegal sentence") (internal citation marks omitted);

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[3] To be subject to correction as an illegal sentence under I.C.R. 35(a), the sentence also must be one that is "illegal from the face of the record, i.e., does not involve significant questions of fact or require an evidentiary hearing." *State v. Clements*, 148 Idaho 82, 86, 218 P.3d 1143, 1147 (2009). This standard specifies where a court should look to determine whether a sentence is illegal, but not what the court should be looking for.

CHARLES A. WRIGHT & SARA N. WELLING, 3 FEDERAL PRACTICE AND PROCEDURE § 617 (4th ed. 2009) ("A sentence within statutory limits but that was contrary to a plea agreement already accepted by the court was considered imposed in an illegal manner."). Therefore, Austin's motion to correct the sentences was subject to the time constraints of I.C.R. 35(b).

If, as I would hold, Austin's sentences are not illegal but were imposed in an illegal manner, then his present motion was untimely, and the district court's denial of the motion should be affirmed on that ground. He is not left without a potential remedy, however, for if Austin's probation in this case is ever revoked, there will be a fourteen-day window following the revocation order within which he may renew this motion to correct his sentences pursuant to I.C.R. 35(b).