

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 41444

STATE OF IDAHO,) 2015 Unpublished Opinion No. 390
)
Plaintiff-Respondent,) Filed: March 4, 2015
)
v.) Stephen W. Kenyon, Clerk
)
BRANDON M. MEYER,) THIS IS AN UNPUBLISHED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, Fremont County. Hon. Jon J. Shindurling, District Judge.

Order denying Idaho Criminal Rule 35 motion for reduction of sentence, affirmed.

Sara B. Thomas, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Mark W. Olson, Deputy Attorney General, Boise, for respondent.

Before MELANSON, Chief Judge; LANSING, Judge;
and GRATTON, Judge

PER CURIAM

Brandon M. Meyer was convicted of burglary and served time in prison. While incarcerated, he filed a motion seeking to reduce his sentence pursuant to Idaho Criminal Rule 35. That motion was denied and Meyer appeals that denial.

I.

BACKGROUND

In 2005, Meyer pleaded guilty to burglary and was placed on probation for a period of five years, but the court withheld judgment at that time. In 2007, the State initiated probation

violation proceedings and pursuant to those proceedings, Meyer was required to participate in mental health court.¹ In 2009, the State re-initiated probation violation proceedings because Meyer had left treatment, had tested positive for alcohol use, and had been terminated from the mental health court program. The court entered a judgment of conviction and imposed a unified five-year sentence with two years fixed, but placed Meyer back on probation. Meyer was then admitted into a different mental health court program. In 2011, the State initiated probation violation proceedings again, alleging, *inter alia*, that Meyer had failed to comply with the mental health court rules. The district court revoked probation, but retained jurisdiction. Meyer completed the rider and was placed back on probation. After the court found that Meyer had violated probation by failing to report to his probation officer and moving without permission, the court revoked probation and entered an amended judgment executing the underlying sentence on June 4, 2012.²

On April 25, 2013, Meyer filed a motion seeking credit for time served. He sought a total of 238 days' credit. He admitted that he had received credit for those periods in other cases, but argued that he was also entitled to credit in this case because he was held awaiting disposition on probation violation proceedings. The district court denied this request.

Next, on May 23, 2013, Meyer filed a second motion titled "Motion for Correction or Reduction of Sentence (I.C.R. 35)." In that motion, he requested credit for the same period of 238 days and also sought a reduction of his fines, fees, and restitution. Meyer also requested some type of parole or commutation of his sentence based upon the alleged "deliberate indifference" to his health concerns and the "cruel and unusual punishment" he had undergone. Finally, he requested the appointment of counsel.

The court appointed counsel who filed a motion seeking commutation of Meyer's sentence pursuant to Idaho Criminal Rule 33(d). The court held a hearing on all of Meyer's pending motions. It explained that the evidence Meyer had submitted showed that he had been

¹ While placed in mental health court, Meyer served time in jail and on the sheriff's labor detail as a sanction.

² Our recitation of the facts is a summary and does not contain a complete recounting of all the probation violation proceedings. For example, by the district court's count, the State alleged probation violations in six separate proceedings. We merely recite the proceedings that frame our consideration of this appeal.

incarcerated, but did not show whether that time was creditable. Therefore, the court deferred ruling on the credit for time served claim and ordered Meyer or his attorney to provide supplemental information to show whether the time was creditable. The court then denied the remainder of Meyer's pro se Rule 35 motion, construing it as an untimely request for relief under I.C.R. 35(b). Lastly, the court granted the request for commutation pursuant to Rule 33(d), stating that it would place Meyer on probation.³

II. ANALYSIS

Meyer appeals the denial of his pro se Rule 35 motion. He does not contest the court's decision regarding credit for time served, and the record seems to indicate that he continued to endeavor to obtain the records required to advance that claim. Rather, Meyer appears to contest the remainder of the motion, the portion that the district court construed as a motion seeking a reduction of sentence pursuant to I.C.R. 35.

On appeal, Meyer does not contest the district court's conclusion that this portion of the motion was made pursuant to I.C.R. 35(b). That conclusion appears to be unavoidable as the motion was filed pursuant to I.C.R. 35 and the other two subsections of that rule are plainly inapplicable. Meyer did not contend that his sentence was illegal and thus governed by I.C.R. 35(a).⁴ Nor was this portion of the motion made pursuant to Rule 35(c), which governs credit for time served. Accordingly, the district court reasonably construed the motion as seeking a sentence reduction pursuant to I.C.R. 35(b).

The district court correctly held that the portion of the motion that was made pursuant to I.C.R. 35(b) was untimely. Such a motion must be made within "fourteen (14) days after the filing of the order revoking probation" or "within 120 days of the entry of the judgment imposing sentence or order releasing retained jurisdiction." Meyer's motion, filed in May 2013, was not timely from the order revoking probation or the amended judgment of conviction, both entered in June 2012. This time limitation is a jurisdictional restraint on the power of the court that deprives the court of the authority to entertain an untimely motion. *State v. Fox*, 122 Idaho 550,

³ The propriety of this action has not been raised as an issue on appeal.

⁴ Pursuant to I.C.R. 35(a), a defendant may request that the trial court "correct a sentence that is illegal from the face of the record at any time."

552, 835 P.2d 1361, 1363 (Ct. App. 1992); *State v. Hocker*, 119 Idaho 105, 106, 803 P.2d 1011, 1012 (Ct. App. 1991); *State v. Parrish*, 110 Idaho 599, 600, 716 P.2d 1371, 1372 (Ct. App. 1986). Accordingly, the court did not err by concluding that this component of Meyer's Rule 35 motion was untimely and denying it.

Finding no error, we affirm the order denying Meyer's request for relief pursuant to I.C.R. 35.