

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 46423

STATE OF IDAHO,)
) **Filed: August 8, 2019**
) **Plaintiff-Respondent,**)
) **Karel A. Lehrman, Clerk**
v.)
) **THIS IS AN UNPUBLISHED**
) **OPINION AND SHALL NOT**
) **BE CITED AS AUTHORITY**
) **MARK DICKENS FORSYTHE,**)
) **Defendant-Appellant.**)
)

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Samuel A. Hoagland, District Judge.

Order denying I.C.R. 35 motion for correction of illegal sentence, affirmed.

Eric D. Fredericksen, State Appellate Public Defender; Andrea W. Reynolds, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

Before GRATTON, Chief Judge; LORELLO, Judge;
and BRAILSFORD, Judge

PER CURIAM

Mark Dickens Forsythe was found guilty of possession of a controlled substance, I.C. § 37-2732(c)(1)(F), and admitted to being a persistent violator, I.C. § 19-2514. The district court sentenced Forsythe to a unified term of fifteen years, with a minimum period of confinement of three years. Forsythe appealed, challenging the denial of his motion to suppress. This Court affirmed Forsythe's judgment of conviction in an unpublished opinion. *State v. Forsythe*, Docket No. 45442 (Ct. App. Mar. 11, 2019). Forsythe filed an I.C.R. 35 motion asserting that his sentence is illegal because he should not have been sentenced as a persistent violator. The

district court denied the motion, finding that Forsythe's sentence is not illegal. Forsythe appeals.¹

In *State v. Clements*, 148 Idaho 82, 86, 218 P.3d 1143, 1147 (2009), the Idaho Supreme Court held that 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. Rule 35 is a "narrow rule," and 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. *State v. Farwell*, 144 Idaho 732, 735, 170 P.3d 397, 400 (2007). 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 is excessive. *Clements*, 148 Idaho at 86, 218 P.3d at 1147.

First, Forsythe argues that his sentence is illegal because the persistent violator enhancement can only apply upon a third felony conviction and not to any subsequent conviction. Forsythe's argument is foreclosed by binding precedent. In *State v. Bates*, 63 Idaho 119, 117 P.2d 281 (1941), the Court stated: "Obviously the legislature never intended by such statute 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 121, 117 P.2d at 281. Forsythe acknowledges *Bates* and offers no basis for disregarding it.

Second, Forsythe contends that the more specific enhancement set forth in I.C. § 37-2739 trumps the general persistent violator enhancement of I.C. § 19-2514 with respect to I.C. § 37-2732, the statute under which he was found guilty of possession of a controlled substance. In denying Forsythe's motion, the district court concluded that *State v. Beavers*, 152 Idaho 180, 186, 268 P.3d 1, 7 (Ct. App. 2010) is controlling legal authority and does not support Forsythe's argument. Forsythe is "mindful" that there is no legal authority supporting his position and that the plain language of I.C. § 19-2514 does not limit its application in the manner he suggests.

Third, Forsythe acknowledges that he is "mindful" that he was charged with violating I.C. § 37-2732(c), which specifically states that the crime is a felony, but argues that he could not

¹ Forsythe was also found guilty and sentenced for misdemeanor possession of drug paraphernalia. However, that sentence is not an issue on appeal.

be sentenced as a persistent violator because his possession of a controlled substance charge was not designated as a felony at the outset. He contends his conviction did not constitute a felony until the district court imposed a sentence greater than that permitted for a misdemeanor. The district court properly rejected Forsythe's argument based on its finding that Forsythe was charged with a felony at the outset.

Fourth, Forsythe argues that I.C. § 19-2514 violates equal protection and due process, claiming it is "a constitutional violation for the term of imprisonment to be enhanced, but not the fine." Forsythe does not cite any authority to support this claim or any argument demonstrating error in the district court's denial of relief on this claim. Therefore, we decline to consider it. A party waives an issue on appeal if either authority or argument is lacking. *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996).

Forsythe has failed to demonstrate any error in the denial of his Rule 35 motion. Accordingly, we conclude no abuse of discretion has been shown and the district court's order denying Forsythe's Rule 35 motion is affirmed.