

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

OCT 31 2011

State of North Dakota,)
)
 Plaintiff-Appellee,)
)
 vs.)
)
 Kenneth Eide,)
)
 Defendant-Appellant.)

STATE OF NORTH DAKOTA

SUPREME COURT NOS. 20110263-
20110269

APPELLANT'S BRIEF

APPEAL FROM THE SEPTEMBER 9, 2011 ORDER
DENYING RULE 35(A) MOTION
THE PEMBINA COUNTY COURT IN CAVALIER, NORTH DAKOTA.
THE HONORABLE LAURIE A. FONTAINE PRESIDING

ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUE PRESENTED

- I. Whether the district court usurped its authority by promulgating an illegal sentence by amending the Judgments nine years after they were entered?

STATEMENT OF THE CASE

Defendant-Appellant Kenneth Eide appeals from the September 9, 2011 Order Denying Rule 35(a) Motion. (A-55)¹ Defendant argues that the court imposed an illegal sentence by amending the Judgments nine years after they were entered to extend the length of probation.

On May 17, 2001, Defendant was charged via Information on four counts of Gross Sexual Imposition, Class A Felonies; one count of Gross Sexual Imposition, a Class B Felony; five counts of Corruption of a Minor, and one count of Attempted Sexual Assault. Subsequently, in August 2001, Defendant was charged with four additional counts of Class A Felony Gross Sexual Imposition. (A-26)

Defendant plead guilty to six counts of Gross Sexual Imposition, Class A Felonies; one count of Gross Sexual Imposition, Class B Felony; and the Attempted Sexual Assault. (A-30 through A-37) The remaining charges were dismissed. On the Class A Felony Gross Sexual Impositions, Defendant was sentenced to eleven years imprisonment with five years suspended for a period of

¹ Appendix

five years during which time Defendant was on supervised probation. (A-33) All sentences were to run concurrent. (A-30 through A-37)

Prior to being released from prison, Defendant was civilly committed as a sexually dangerous individual in the Interest of Kenneth Eide, #34-06-R-26. (Attached Exhibit of the Rule 35(a) Motion, A-45 and Order Denying Rule 35(a) Motion, A-52) On December 27, 2010, Judge Laurie A. Fontaine discharged Defendant from civil commitment and ordered that "Kenneth Eide be released from custody of the Executive Director of the Department of Human Services." (A-51) However, the court modified the terms of the original Judgments by extending Defendant's probation: "Kenneth Eide will remain on probation for a period of five (5) years after his release from custody, and his criminal judgment will be clarified." (A-51) Defendant's probation was originally scheduled to terminate in June 2011. (Order Denying Rule 35(a) Motion, A-53)

Subsequently, Amended Judgments were entered in 34-01-K-153, 34-01-K-154, 34-01-K-155, 34-01-K-156, and 34-01-K-157 to reflect the court's December 27, 2011 Order. In 34-01-K-163, the Judgment was not amended as that sentence had expired. Technically, the court did not enter an Amended Judgment in 34-01-K-352. However, the docket sheets indicate that said sentence had been modified despite the fact that an Amended Judgment was never entered.

(A-23)

On June 7, 2011, Defendant served and filed his Rule 35(a) Motion. Defendant moved the court for an Order, correcting the illegal sentence promulgated in the Amended Criminal Judgments. Defendant argued that the district court had no authority to amend the criminal judgments. (A-43) The Rule 35(a) Motion was noticed pursuant to N.D.R.Ct. 3.2(a)(1). The State failed to file a response.

On July 25, 2011, Defendant filed and served a Reply Brief and a proposed Order granting the Rule 35(a) Motion because presumably the State did not oppose said motion. (Reply Brief, docket sheet, No. 23 and Certificate of Service, docket sheet, No. 24) Once again, the State failed to respond.

On September 9, 2011, Judge Fontaine issued her Order Denying Rule 35(a) Motion. (A-52) The judge reasoned that the civil commitment case tolled the probation time and the modification was legal since it adds "no additional penalty to Defendant."

"The Court amended the criminal judgments to comply with the original intent of the criminal judgment, which was to require five (5) years of supervised probation after Mr. Eide was released from custody. At the time of the original sentence it was not anticipated that the Defendant would spend time as a result of civil commitment. The amendment does not change the original sentence in any way, other than

to extend the probationary period to a different time because of the civil commitment. In the original Judgment and Sentence, Mr. Eide was ordered to have five (5) years of supervised probation following his release from incarceration. The amendment requires five (5) years of supervised probation, no less or no more than the original sentence. The amendment only relates to when the five (5) years begins. The sentence does not add any time of incarceration.

In cases of this serious nature, this Court concludes the modification was within the law as it adds no additional penalty to the Defendant." (Order Denying Rule 35(a) Motion, p. 2, A-53) The court cited no legal authority to justify its position.

Thereafter, on September 12, 2011, Defendant filed his Notice of Appeal, appealing the Order Denying his Rule 35(a) Motion. (A-55)

STATEMENT OF THE FACTS

The facts relevant to this issue in this appeal are not in dispute. Because this is almost entirely a legal issue, most of the facts germane to the legal issue have already been discussed in the Statement of Case.

Criminal Judgments against Defendant were entered on or about August 29, 2001. (A-31 through A-37) Neither party filed a notice of appeal.

Approximately nine years later, the court amended the Judgments by ordering that the five years of probation started upon the Defendant's release from his civil commitment case--not upon his release from prison. (A-38 through A-42)

According to the original Judgments, Defendant's probation on all his cases would have terminated in June 2011. (A-53) No petition to revoke Defendant's probation was ever filed under N.D.C.C. § 12.1-32-07. Defendant did not violate a single condition of probation during his five years of supervised probation. Moreover, neither the State, nor Judge Fontaine claimed that Defendant violated a single condition of probation during his five years of supervised probation.

ARGUMENT

- I. The district court usurped its authority by promulgating an illegal sentence by amending the Judgments nine years after they were entered.

A motion to correct an illegal sentence can be made at any time. Rule 35(a) of the Rules of Criminal Procedure provides:

"The sentencing court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided for reduction of sentence in Rule 35(b)(1)."

"A sentence is illegal under Rule 35(a), N.D.R.Crim.P., if it is not authorized by the judgment of conviction." State v. Raulston, 2005 ND 212, ¶ 7, 707 N.W.2d 464. "We have recognized that an illegal sentence may be contrary to statute, fail to comply with a promise of a plea bargain, or be inconsistent with the oral pronouncement of the sentence." State v. Edwards, 2007 ND 113, ¶ 5, 736 N.W.2d 449.

Here, the district court usurped its authority when it sua sponte amended the Criminal Judgments. The district court had no statutory authority or authority under the Rules of Criminal Procedure to modify the Criminal Judgments. Neither party filed an appeal, appealing the original Judgments. The time to appeal expired over nine years ago. Therefore, the Judgments are deemed valid and final by both parties. The court did not have jurisdiction under

N.D.R.Crim.P. 32(f) or N.D.C.C. § 12.1-32-07 to amend the criminal judgments because Defendant did not violate any condition of probation and the State did not file a petition revoking his probation.

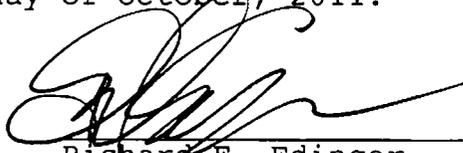
Finally, sexually dangerous individual cases are civil in nature. Matter of Midgett, 2007 ND 198, ¶ 9, 742 N.W.2d 803. Moreover, in order to comport with the holding in Kansas v. Crane, 534 U.S. 407, 413 (2002) and substantive due process of law, civil commitment proceedings cannot have any association whatsoever with a criminal case. Civil commitment proceedings cannot be a "mechanism for retribution or general deterrence." The civil commitment proceedings cannot circumvent the criminal justice system. Crane at 412. Defendant's criminal cases are separate and distinct from his sexually dangerous individual case. Under Kansas v. Crane and its progeny, the filing of a sexually dangerous individual case cannot give the district court the authority to modify the underlying criminal case.

This is a clear example of the district court usurping its authority and imposing an illegal sentence. The State's failure to respond to the Rule 35(a) Motion, the Reply Brief, and the proposed Order is a clear indication that the State believed the judge usurped its authority. "Failure to file a brief by the opposing party may be deemed an admission that, in the opinion of party or counsel, the motion is meritorious." N.D.R.Ct. 3.2(c)

CONCLUSION

WHEREFORE, the reasons stated herein, Appellant respectfully requests that this Honorable Court reverse the Order denying Rule 35(a) Motion; correct the illegal sentences promulgated in each and every Amended Judgment and in each and every case in which the district court failed to enter an Amended Judgment, but changed the sentence via the docket sheets; vacate the Amended Judgments in each and every case; and reinstate the original terms of the Judgments in each and every case. Moreover, the Defendant respectfully requests that this Honorable Court terminate Defendant's supervised probation on each and every case forthwith since the period of supervised probation expired in June 2011.

Dated this 31st day of October, 2011.



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CERTIFICATE OF SERVICE

Richard E. Edinger, hereby certifies and swears that:

On October 31, 2011, at or about 7:00 p.m., I served a copy of the Appellant's Brief and Appendix onto Appellee.

I put a true and correct copy of the aforementioned documents in a first class postage prepaid envelope addressed to Mr. Stuart Askew, State's Attorney, at his last reasonably ascertainable post office address, 301 Dakota Street West, #9, Cavalier, North Dakota 58220 and deposited the envelope in the U.S. mail in Fargo, North Dakota.

Dated this 31st day of October, 2011.



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