

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 38232

STATE OF IDAHO,)	2011 Unpublished Opinion No. 673
)	
Plaintiff-Respondent,)	Filed: October 21, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
CHARLES EDWARD SMITH,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

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

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

Charles E. Smith, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Russell J. Spencer, Deputy Attorney General, Boise, for respondent.

MELANSON, Judge

Charles Edward Smith appeals from the district court’s order denying his Idaho Criminal Rule 35 motion for correction of an illegal sentence. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Smith was found guilty by a jury of felony driving under the influence (DUI). I.C. §§ 18-8004, 18-8005(7). Smith was also determined to be a persistent violator. I.C. § 19-2514. He was sentenced to a unified term of twenty years, with a minimum period of confinement of six years. Smith filed an I.C.R. 35 motion for reduction of his sentence, claiming that his sentence was “disproportionate for the crime of DUP” and that the presentence investigator’s assessment was inaccurate. Smith also filed a Rule 35 motion alleging that his sentence was illegal. The district court held a hearing and issued an order reducing Smith’s minimum period of confinement to five years. The district court did not specifically address Smith’s claim that his sentence was illegal.

Smith appealed. Smith's appellate counsel raised a single issue--whether Smith's right to a jury trial was violated by the officer's testimony that Smith was intoxicated. Smith's counsel was granted leave to withdraw, and Smith filed a supplemental brief pro se raising several other issues. Among the issues raised by Smith was a claim that Idaho's DUI statutes violate the Equal Protection Clause and are void for vagueness. Smith also argued that his sentence was illegal because application of both the felony DUI enhancement and the persistent violator enhancement violated constitutional prohibitions against double jeopardy. In an unpublished opinion, this Court affirmed Smith's judgment of conviction. *State v. Smith*, Docket No. 34855 (Ct. App. Apr. 21, 2010). However, we declined to address Smith's equal protection and void for vagueness claims because they were raised for the first time on appeal. Further, we did not address Smith's claim regarding the legality of his sentence because it was not properly before this Court.

Thereafter, Smith filed another Rule 35 motion for correction of an illegal sentence, which is the subject of this appeal. Smith's motion alleged that his sentence was illegal because it subjected him to multiple punishments for the same offense. The district court denied this motion by a notation on the face of the motion without entering a separate written order. Smith appeals from the denial of this Rule 35 motion and again claims that his sentence is illegal because it violates constitutional prohibitions against double jeopardy. Smith also asserts additional grounds for his appeal, including a claim that his felony conviction is erroneous and that Idaho's DUI statutes violate substantive due process.

II. ANALYSIS

We first address Smith's double jeopardy claim. Specifically, Smith argues that his sentence is illegal because I.C. § 18-8005(7)¹ is an enhancement provision like I.C. § 19-2514 and, therefore, application of both provisions subjected him to multiple punishments for the same offense. 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.*

¹ Now codified as I.C. § 18-8005(9).

Rodriguez, 119 Idaho 895, 897, 811 P.2d 505, 507 (Ct. App. 1991). We initially note that Smith does not claim that the Double Jeopardy Clause of the Idaho Constitution provides any broader protection than that of the United States Constitution. Therefore, we will analyze this claim under the Double Jeopardy provisions of the United States Constitution. See *State v. Talavera*, 127 Idaho 700, 703, 905 P.2d 633, 636 (1995).

Whether a defendant's prosecution complies with the constitutional protection against being placed in jeopardy twice is a question of law over which we exercise free review. *State v. Santana*, 135 Idaho 58, 63, 14 P.3d 378, 383 (Ct. App. 2000). The Double Jeopardy Clause of the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Clause affords a defendant three basic protections. It protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple criminal punishments for the same offense. *Schiro v. Farley*, 510 U.S. 222, 229 (1994); *State v. McKeeth*, 136 Idaho 619, 622, 38 P.3d 1275, 1278 (Ct. App. 2001). Smith's challenge invokes the prohibition against multiple punishments for the same offense.

Smith argues that I.C. § 18-8005(7) is an enhancement provision like I.C. § 19-2514, and its application punished Smith because it elevated his DUI charge from a misdemeanor to a felony and authorized an increased sentence. Idaho courts have sometimes described a statutory provision that elevates a charge from a misdemeanor offense to a felony offense in certain circumstances as a charging enhancement. See generally *State v. Weber*, 140 Idaho 89, 90 P.3d 314 (2004); *State v. Schmoll*, 144 Idaho 800, 172 P.3d 555 (Ct. App. 2007); *Wilson v. State*, 133 Idaho 874, 993 P.2d 1205 (Ct. App. 2000). The elements of the crime of felony DUI pursuant to I.C. § 18-8005(7) consist of committing a violation of I.C. § 18-8004 after having pled or been found guilty of at least one felony DUI within the previous fifteen years. Idaho courts have sometimes referred to this as a charging enhancement, but it differs from a sentencing enhancement--one that authorizes or requires increased penalties in certain circumstances but does not create a separate substantive crime. See generally *State v. Anderson*, 145 Idaho 99, 175 P.3d 788 (2008); *State v. Gerardo*, 147 Idaho 22, 205 P.3d 671 (Ct. App. 2009); *State v. Leslie*, 146 Idaho 390, 195 P.3d 749 (Ct. App. 2008). Idaho Code Section 19-2514 is a sentencing enhancement because it does not alter the elements of the offense but increases the permissible punishment by requiring a minimum term of confinement of five years, which term may extend

to life, for any person convicted for the third time of the commission of a felony. The state need only prove that the defendant has two or more prior felony convictions. Idaho Code Section 18-8005(7), which elevates what would otherwise be a misdemeanor to a felony, is not a sentencing enhancement like I.C. § 19-2514. Smith's argument is analogous to saying that aggravated battery (a felony) is an "enhancement" of misdemeanor battery. However, like aggravated battery and misdemeanor battery, the crimes of felony DUI and misdemeanor DUI are separate substantive crimes that have some elements in common.

Even if we were to hold that I.C. § 18-8005(7) is a sentence enhancement provision like I.C. § 19-2514, the Idaho Supreme Court has specifically rejected the claim that multiple sentence enhancements cannot be applied to the same underlying crime. In *State v. Kerrigan*, 143 Idaho 185, 188, 141 P.3d 1054, 1057 (2006), the Court considered whether legislative intent that two enhancements not apply could be gleaned from the statutes at issue. The Court concluded that both enhancements could be applied because the district court had statutory authority for each sentence enhancement considered separately, the statutes contained no language prohibiting both enhancements from being applied to a sentence for a single substantive crime, and application of both enhancements served the legislature's intent to deter the conduct proscribed by each of them. *Id.*

Here, the district court had statutory authority for each enhancement considered separately. Idaho Code Section 18-8005(7) provided for a sentence not to exceed ten years and I.C. § 19-2514 provided for a minimum term of confinement of five years, which term could extend to life. Where the language of a statute is plain and unambiguous, this Court must give effect to the statute as written, without engaging in statutory construction. *State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999); *State v. Burnight*, 132 Idaho 654, 659, 978 P.2d 214, 219 (1999); *State v. Escobar*, 134 Idaho 387, 389, 3 P.3d 65, 67 (Ct. App. 2000). The statutes at issue contain no language prohibiting both enhancements from being attached to a sentence for a single substantive crime. The plain language of I.C. § 18-8005(7) provides that a DUI is a felony if the person has pled guilty or has been found guilty of a felony DUI within the previous fifteen years. There is no language supporting a claim that the felony DUI statute precludes use of prior felony DUI convictions to elevate a new DUI to a felony as the same prior felony was the basis for a persistent violator enhancement. Also, the plain language of I.C. § 19-2514 states that it applies to any person convicted for the third time of the commission of a felony and does not

limit its application where one of the prior felony convictions is for a DUI that also results in enhancement of the current DUI to a felony. *See State v. Salazar*, 95 Idaho 650, 651, 516 P.2d 707, 708 (1973) (second use of prior conviction to establish persistent violator enhancement in two separate cases does not constitute double jeopardy). Finally, the two enhancements are not duplicative. The DUI charging enhancement statutes serve the legislature’s purpose of removing repeat DUI offenders from the roadways and deterring other potential multiple DUI offenders. *Leslie*, 146 Idaho at 392, 195 P.3d at 751. Idaho Code Section 19-2514 serves the legislature’s purpose of deterring felony recidivism by subjecting recidivists to more severe punishment than a first-time offender would be. *State v. Helms*, 143 Idaho 79, 81, 137 P.3d 466, 468 (Ct. App. 2006). Accordingly, application of both enhancements to the single substantive offense of DUI in this case serves the legislative purpose of deterring the distinct conduct proscribed by each of them.

We next address Smith’s claim that he should not have been convicted of a felony because I.C. § 18-8005(7) uses the language “shall be sentenced pursuant to subsection (5).” He contends this makes I.C. § 18-8005(5),² which Smith characterizes as a statute of limitation, controlling over I.C. § 18-8005(7). Smith further asserts that *State v. Scott*, 135 Idaho 457, 19 P.3d 771 (Ct. App. 2001) is controlling. In that case, this Court construed I.C. § 18-8005(5) and held that, according to the plain language of the statute, a felony DUI is committed where the defendant has previously pled guilty to or been found guilty of two or more DUI offenses within five years of the date of the pending offense. *Id.* at 459, 19 P.3d at 773. Accordingly, Smith asserts that his felony DUI conviction should be set aside because he did not commit two or more DUI offenses within five years of the offense that led to his conviction.

The language of I.C. § 18-8005(7), which stated “shall be sentenced pursuant to subsection (5),” does not make I.C. § 18-8005(5) controlling such that Smith had to be guilty of two or more DUI violations within five years rather than one felony DUI violation within fifteen years to be convicted of felony DUI. Subsection (7) simply provides that Smith is subject to the statute’s felony sentencing provisions. Smith was found guilty of felony DUI in 1996 and again in 2002.³ Smith’s argument is without merit.

² Now codified as I.C. § 18-8005(6).

³ Smith was also found guilty of grand theft in 1984.

We next address Smith's argument that Idaho's DUI statutes violate substantive due process. Smith first asserts that, when the legislature amended I.C. § 18-8005(5) in 2006 and changed the backward-looking period from five to ten years, the legislature did not amend I.C. §§ 18-8004C(2)(a)⁴ and 18-8004A(3)⁵ accordingly. Smith asserts that this failure to amend all sections of Idaho's DUI statutes created an ambiguity in the statutes and violated substantive due process. Smith also asserts that the legislative intent of I.C. § 18-8005(5) was interpreted in *Scott* to limit the backward-looking period of time to five years, and the legislature should have been aware of this Court's ruling in *Scott* and legislated accordingly. Smith further asserts that Idaho's DUI statutes now imply that a person under twenty-one and a person with an excessive alcohol limit are less of a threat to the public safety than any other person in violation of I.C. § 18-8004 as shown by the greater potential sanctions to be imposed in the latter situations. Smith argues that this also created an ambiguity in the statutes and violated substantive due process.

It is well established that challenges to the constitutionality of a statute raised for the first time on appeal will not be considered. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). The exception to this rule is that constitutional issues may be considered for the first time on appeal if such consideration is necessary for subsequent proceedings in this case. *Id.* While Smith raises his claim that Idaho's DUI statutes violate substantive due process for the first time on appeal, he asserts that we should consider his claim because he intends to file post-conviction proceedings and our consideration is necessary for such proceedings.

⁴ Idaho Code Section 18-8004C(2) provides that any person who is found guilty or pleads guilty to a violation of I.C. § 18-8004 and has an excessive alcohol concentration, and who previously has been found guilty or pled guilty to one or more violations of I.C. § 18-8004 in which the person had an excessive alcohol concentration within five years shall be guilty of a felony and sentenced for no more than five years.

⁵ Idaho Code Section 18-8004A(3) provides that any person who pleads guilty to or is found guilty of a violation of 18-8004(1)(d) (which provides that it is unlawful for any person under the age of twenty-one years who has an alcohol concentration of at least .02 but less than .08 to drive or be in actual physical control of a motor vehicle within the state) and who previously has been found guilty or has pled guilty to two or more violations of 18-8004(1)(a), (b), (c), or (d) within five years shall be guilty of a misdemeanor and sentenced for a mandatory minimum period of ten days not to exceed six months.

Even assuming a cogent post-conviction claim could be raised, the statutes are plain on their face, and we decline to engage in statutory construction. In amending the statutes in 2006, the legislature could have changed the backward-looking period from five to ten years in I.C. §§ 18-8004C(2)(a) and 18-8004A(3) as it did in I.C. § 18-8005(5). The legislature did not do so and there is no reason to suppose the legislature did not do as it intended. Further, while the legislature chose to allow imposition of greater sanctions for other violations of I.C. § 18-8004 than for I.C. §§ 18-8004C(2)(a) and 18-8004A(3), that decision is within the province of the legislature and does not, by itself, create an ambiguity that violates substantive due process. Therefore, Smith's claim that Idaho's DUI statutes violate substantive due process is without merit.

We finally address Smith's argument that the district court abused its discretion when it held a hearing on his first Rule 35 motion, gave the state time to obtain a disciplinary offense report history, and then did not conduct another hearing to give Smith an opportunity to present argument that his sentence was illegal (his second Rule 35 motion) before granting his first Rule 35 motion. Whether the disposition of a Rule 35 motion requires a hearing is a matter within the sound discretion of the trial court, and this Court will not overturn the trial court's decision absent an abuse of that discretion. *State v. Thomas*, 133 Idaho 682, 689, 991 P.2d 870, 877 (Ct. App. 1999); *State v. Hills*, 130 Idaho 763, 765, 947 P.2d 1011, 1013 (Ct. App. 1997).

The district court held a hearing on Smith's Rule 35 motion and heard argument from the state and Smith. Smith presented argument in support of a reduction of his sentence, but did not present any argument that his sentence was illegal. Following argument, the district court reserved ruling on Smith's motion and allowed the state to supplement the record with Smith's prison disciplinary offense report. The district court indicated that, once the supplemental record was submitted by the state, the district court would conduct an additional hearing if either party had any objection to such information. Approximately two months later, the district court issued its order reducing Smith's sentence without holding another hearing.

Even assuming, without deciding, the district court erred in not conducting another hearing, we have addressed Smith's claim that his sentence is illegal and concluded that the claim has no merit. Accordingly, the district court did not err in denying Smith's Rule 35 motion for correction of an illegal sentence.

III.
CONCLUSION

The district court did not impose an illegal sentence in violation of the constitutional prohibitions against double jeopardy because Smith was not subjected to multiple criminal punishments for the same offense. Smith's felony conviction was not erroneous because I.C. § 18-8005(7) was appropriately applied in this case. Idaho's DUI statutes do not create ambiguity as Smith asserts, and therefore do not violate substantive due process. Finally, the district court did not err in granting Smith's Rule 35 motion for a reduction of his sentence without holding an additional hearing. Therefore, the district court's order denying Smith's Rule 35 motion to correct an illegal sentence is affirmed.

Chief Judge GRATTON and Judge LANSING, **CONCUR.**