

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37672

STATE OF IDAHO,)	2011 Unpublished Opinion No. 469
)	
Plaintiff-Respondent,)	Filed: May 11, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
WILLIAM TAYLOR STONE,)	THIS IS AN UNPUBLISHED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. Richard D. Greenwood, District Judge.

Order denying Idaho Criminal Rule 35 motion, affirmed.

The Cox Law Firm; Sean C. Beaver, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

William Taylor Stone appeals from district court’s denial of his Idaho Criminal Rule 35 motion for reduction of sentence. Stone also asserts, for the first time on appeal, that his counsel was ineffective. For the reasons set forth below, we affirm.

I.

BACKGROUND

After a grand jury indicted Stone for inappropriate sexual contact with his stepdaughter, Stone pled guilty to two counts of felony sexual battery of a minor, Idaho Code § 18-1508A, pursuant to a nonbinding plea agreement. The district court ordered a presentence investigative report and a psychosexual evaluation. Stone also separately obtained another psychosexual evaluation. At sentencing, the state presented expert testimony from a counselor specializing in children and adolescents who have been sexually abused. The expert did not meet with the victim, but reviewed the police reports prepared in this case before testifying. The state’s expert

testified, without objection, regarding the dynamics of abuse and the emotional, physical, and psychological impact it has on children. The district sentenced Stone to a term of twenty years with ten years determinate.

Stone filed a Rule 35 motion for reduction of sentence and requested a hearing on the motion. Stone maintained that a change should be made to his sentence because the district court misinterpreted the agreement between Stone and the state as a binding plea agreement, and the state made incorrect and prejudicial characterizations of the evidence at sentencing, including the representation that the victim actually wrote the victim impact statement. The district court issued a memorandum decision denying Stone's request for sentencing relief pursuant to Rule 35 and his request for a hearing. Stone appeals.

II. DISCUSSION

A. Rule 35 Motion

Stone asserts that the district court abused its discretion by denying his Rule 35 motion. He argues that the sentence imposed is excessive and illegal because the district court relied on the inclusion of a fraudulent victim impact statement that was actually written by someone other than the victim, thereby violating his fundamental rights.

An illegal sentence under Rule 35 is one in excess of a statutory provision or otherwise contrary to applicable law. *State v. Alsanea*, 138 Idaho 733, 745, 69 P.3d 153, 165 (Ct. App. 2003). Stone's sentence does not fall within either of these categories. Stone does not provide any actual evidence that the victim did not write her own statement. He merely bases this argument on his own personal opinion that the victim could not have written the statement because she was a "marginal student in high school" and that the words and phrases within the statement were "inconsistent with who she is." The district court stated that while it was inclined to believe that the victim received help in writing the statement, the statement did not contain anything particularly sophisticated or clinical as to suggest that the statement was written by someone else. The district court further determined that even if the statement was written by someone other than the victim, the victim adopted the statement as her own. We agree and note that Stone has not provided any authority for the proposition that a sentencing court is not allowed to consider a victim impact statement that the victim was assisted in writing. *See State v. Grazian*, 144 Idaho 510, 518, 164 P.3d 790, 798 (2007) (stating when issues on appeal are not

supported by propositions of law, authority, or argument, they will not be considered); *State v. Zichko*, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (same). Therefore, his claim is not within the scope of a motion for correction of an illegal sentence pursuant to Rule 35. Stone has failed to establish that the district court abused its discretion in denying his Rule 35 motion.

Stone further asserts that the district court abused its discretion when it failed to conduct a hearing on his Rule 35 motion because “a potentially fraudulent victim impact statement is not a matter that a Court should take lightly.” The decision whether to conduct a hearing on a Rule 35 motion to reduce a legally imposed sentence is left to the sound discretion of the district court. *State v. Peterson*, 126 Idaho 522, 525, 887 P.2d 67, 70 (Ct. App. 1994). In denying Stone’s request for a hearing on his Rule 35 motion, the district court stated:

The Court declines to set this matter for hearing for the taking of additional testimony and making additional argument. The testimony would apparently be directed to issue [sic] of whether the victim was actually the author of the victim impact statement. . . . The Court does not believe that it would benefit from the taking of testimony on the issue.

Because Stone’s underlying argument, that the victim impact statement was fraudulent, fails for lack of merit, his claim that he was entitled to hearing on this matter also fails. Accordingly, the district court did not abuse its discretion in failing to conduct a hearing on Stone’s Rule 35 motion.

B. Ineffective Assistance of Counsel Claims

Stone asserts that his trial counsel was ineffective for failing to object to or cross-examine expert testimony at sentencing, for failing to object to the expert testimony or opinions in the Rule 35 motion, and for failing to object to the inclusion of the victim impact statement. Stone further asserts that even if the failure to object to the victim impact statement was not ineffective assistance of counsel, the issue was properly preserved for appeal by his filing of a Rule 35 motion. The state counters that Stone’s ineffective assistance of counsel claims were not preserved for appeal and should not be considered for the first time on appeal.

Assuming that a claim of ineffective assistance of counsel in a sentencing proceeding could be presented through a Rule 35 motion to correct an illegal sentence, we nevertheless conclude that an application for post-conviction relief is the proper procedural avenue for relief in this case. It is generally inappropriate to raise a claim of ineffective assistance of counsel on a direct appeal from the judgment of conviction. Instead, claims of ineffective assistance of

counsel are more appropriately preserved through post-conviction relief proceedings where an evidentiary record can be developed. *State v. Mitchell*, 124 Idaho 374, 375-76, 859 P.2d 972, 973-74 (Ct. App. 1993) (holding that an adverse decision would prevent the defendant from developing a claim in a more proper forum because the claim would be *res judicata*). However, although it is well established that ineffective assistance of counsel claims are preferably brought through an application for post-conviction relief, the claim may be properly raised on direct appeal if it is clear from the record that trial counsel was ineffective. *State v. Gray*, 129 Idaho 784, 799, 932 P.2d 907, 922 (Ct. App. 1997).

Instructive on this issue is *Smith v. State*, 146 Idaho 822, 834, 203 P.3d 1221, 1233 (2009). In that case, Smith challenged his designation as a violent sexual predator, and argued that the claims had not been preserved because his counsel did not provide him with effective assistance. Although this argument was not preserved for appeal, Smith argued that if he could not raise his ineffective assistance of counsel claims for the first time on appeal from the district court's order affirming the board's designation, he would never be able to because there was "no procedural vehicle for this claim." The Idaho Supreme Court concluded that because there were no other procedural grounds for relief, and because the record on appeal was sufficient to determine whether the claims had merit, it would consider Smith's claims of ineffective assistance of counsel for the first time on appeal. *Id.*

Although the Supreme Court allowed the defendant to bring a claim of ineffective assistance of counsel for the first time on appeal in *Smith*, it only did so after determining that this was the only avenue for relief and that the record was sufficiently developed. Here, the record is not fully developed in the sense that trial counsel may have had a tactical reason or strategy behind not objecting to the expert testimony or cross-examining the expert, which would not be clear until an evidentiary hearing was held. Moreover, a timely post-conviction petition would provide a procedural ground for relief. Therefore, this Court declines to address Stone's claims of ineffective assistance of counsel for the first time on appeal.

To the extent Stone argues that the failure to object to the victim impact statement issue was properly preserved for appeal by a Rule 35 motion, we conclude, as discussed above, that the district court did not abuse its discretion in denying his motion and that Stone's argument lacks merit.

III.

CONCLUSION

The district court did not abuse its discretion in denying Stone's Rule 35 motion. Furthermore, Stone's ineffective assistance of counsel claims were not preserved and we will not consider them for the first time on appeal. Accordingly, we affirm.

Chief Judge GRATTON and Judge MELANSON **CONCUR.**