

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 42393

STATE OF IDAHO,) 2015 Unpublished Opinion No. 445
)
Plaintiff-Respondent,) Filed: March 27, 2015
)
v.) Stephen W. Kenyon, Clerk
)
SCOTT OWEN HARMON,) THIS IS AN UNPUBLISHED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.

Appeal from order reinstating probation, dismissed.

Sara B. Thomas, State Appellate Public Defender; Shawn F. Wilkerson, Deputy Appellate Public Defender, Boise, for appellant.

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

Before LANSING, Judge; GUTIERREZ, Judge;
and GRATTON, Judge

PER CURIAM

Scott Owen Harmon was convicted of operating a motor vehicle while under the influence of alcohol. On appeal, he contends that the district court erred by imposing an impermissibly long period of probation. We conclude that Harmon may not raise this issue for the first time on appeal.

In 2007, Harmon was charged with a felony charge of operating a motor vehicle while under the influence of alcohol, Idaho Code §§ 18-8004, 18-8005(5).¹ Harmon entered a guilty

¹ At the time of the offense, Idaho Code § 18-8005(5) read as follows:

plea and was sentenced to a unified term of seven years in prison, with two years fixed. The court suspended the sentence however, and placed Harmon on probation for seven years.

In 2013, the State brought probation revocation proceedings, claiming, among other things, that Harmon failed to apply for vocational rehabilitative services, failed to maintain full-time employment, consumed alcohol, and failed to report to his probation officer as ordered. Harmon admitted that he had violated his probation in each of those ways described above. After a hearing, the court revoked probation, but retained jurisdiction.

Four months later, after a rider review hearing, the court again suspended Harmon's sentence and reinstated probation for an additional seven years. Harmon appeals and argues that the court erred by ordering an excessive period of probation.

In this appeal, the gravamen of Harmon's claim is that his sentence is illegal. At the time of Harmon's conviction, Idaho Code § 18-8005(5) authorized a maximum sentence of ten years for his offense and I.C. § 20-222(1) specified that a term of probation, including any extension thereof, "shall not exceed the maximum period for which the defendant might have been imprisoned." Thus, Harmon argues, the reinstated probation term, when added to the prior term of probation, exceeds the statutory maximum.

Whatever the merit of Harmon's claim, it must be raised first in the district court and we will not consider it when raised for the first time on appeal. Generally, issues not raised below may not be considered on appeal, *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). Specifically, "[i]f objection to the illegality of a sentence has not been otherwise raised before the trial court by either the state or the defendant, it may not be raised for the first time on appeal." *State v. Martin*, 119 Idaho 577, 579, 808 P.2d 1322, 1324 (1991). Where Idaho law

(5) Except as provided in section 18-8004C, Idaho Code, any person who pleads guilty to or is found guilty of a violation of the provisions of section 18-8004(1)(a), (b) or (c), Idaho Code, who previously has been found guilty of or has pled guilty to two (2) or more violations of the provisions of section 18-8004(1)(a), (b) or (c), Idaho Code, or any substantially conforming foreign criminal violation, or any combination thereof, within ten (10) years, notwithstanding the form of the judgment(s) or withheld judgment(s), shall be guilty of a felony; and

(a) Shall be sentenced to the custody of the state board of correction for not to exceed ten (10) years

permits a defendant to raise an unpreserved issue on appeal, the defendant must satisfy the fundamental error standard. *State v. Perry*, 150 Idaho 209, 228, 245 P.3d 961, 980 (2010). Harmon has not asserted a claim of fundamental error. Harmon's illegal sentence claim may yet be pursued in the district court through an Idaho Criminal Rule 35(a) motion, but it will not be addressed here.

Having concluded that the only issue raised by Harmon is not properly before this Court, the appeal is dismissed.