

FILED _____

AT _____ O'clock _____ M
CLERK, DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,)
)
 Plaintiff,)
)
 vs.)
)
 FERRELL DAVID ARNOLD, II,)
)
)
 Defendant.)
)
 _____)

Case No. **CRM 2010 8913**

**MEMORANDUM DECISION AND
ORDER ON APPEAL**

I. PROCDEDURAL HISTORY AND BACKGROUND.

Defendant/Appellant Ferrell Arnold (Arnold) was charged with petit theft on April 26, 2010. A jury trial commenced on November 4, 2010. The jury found Arnold guilty of petit theft.

On December 3, 2010, Arnold was sentenced by Magistrate Judge James Stow to 365 days in jail “consecutive to any other sentence” and “now and to begin after any other sentence to run concurrently.” Judgment, p. 1. On January 6, 2011, Arnold timely filed his Notice of Appeal, alleging the sentence imposed by Judge Stow is illegal. Arnold filed his opening brief on April 11, 2011. The State filed its responsive brief on May 9, 2011. Oral argument was held June 22, 2011. Seventeen days *after* Judge Stow imposed this misdemeanor sentence, on December 20, 2011, District Court Judge Benjamin R.

Simpson imposed a felony sentence upon Arnold in a different case. Obviously, Judge Stow was made aware of that upcoming sentence in the felony case when Judge Stow imposed sentence on December 3, 2010, but, equally obvious, Judge Stow knew no felony sentence has been imposed as of December 3, 2010.

II. STANDARD OF REVIEW.

Whether a sentence is illegal is a question of law over which reviewing courts exercise free review. *State v. Peterson*, 121 Idaho 775, 777, 828 P.2d 338, 340 (1992) (citing *State v. Hale*, 116 Idaho 763, 765, 779 P.2d 438, 440 (Ct.App. 1989)).

III. ANALYSIS.

Arnold argues Judge Stow improperly imposed a sentence to run consecutively to a then-nonexistent future sentence and asks the Court to modify his sentence by deleting the provisions calling for his sentence to be served consecutive to his felony sentences. Appellant's Brief, p. 4. Arnold was sentenced by Judge Stow on December 3, 2010; he was sentenced to 365 days in jail with 30 days credit. Tr., p. 6, Ll. 19-21. At the sentencing hearing, Judge Stow stated:

So, I'm gonna order that it's to be run consecutive to any other sentence that you are serving, such that you do have the initial 30 days credit, but otherwise, the sentence will begin either now or after any other sentence is served, depending on which way any correctional institution determines to run, that is whichever order is selected. But it would be a consecutive sentence that'll need to serve.

Tr., p. 7, Ll. 4-11. Arnold states that at the time of sentencing in case CRM 2010 8913, he was not serving any other sentence. Brief of Appellant, p. 3. Following his December 3, 2010, sentencing, Arnold was sentenced by District Judge Benjamin Simpson on December 20, 2010, in three separate felony matters, case numbers CR 2010 14858, CR 2010 151193, and CR 2010 21775, with all three of those sentences to run concurrently. *Id.*, p. 2. It is Arnold's contention that:

...[N]o sentence of any kind was in effect at the time of sentencing. [Arnold] was awaiting sentencing on Three (3) felony matters. The sentence imposed by Judge Stow was a conditional sentence for which there is no authority under Idaho law.

Id., p. 3.

In response, the State concedes Judge Stow “may have not realized the difficulty of imposing an initial sentence consecutive to any future sentence by another court.” Respondent’s Brief, p. 6. The State argues Judge Stow properly exercised his discretion in fashioning Arnold’s sentence. *Id.*, pp. 6-7. The case law cited and quoted by the State is simply not on point because, as both parties recognize, no Idaho case law is directly on point in discussing whether imposing a sentence consecutive to a future sentence is permissible.

This Court has examined foreign case law and treatises on this issue. A treatise discussing cumulative and consecutive sentences reads in relevant part:

The decision as to whether sentences imposed at different times shall run consecutively or concurrently should be made by the last judge imposing sentence. A trial court may not require a sentence otherwise properly imposed to be served consecutively to some other sentence not yet imposed in another pending case. A sentence can only be made consecutive to existing sentences arising from final judgments.

24 C.J.S. *Accommodation to Prior or Subsequent Sentence* § 2100 (2011). On this issue, the Oregon Court of Appeals issued a *per curiam* decision which reads in its entirety:

Defendant was convicted of a burglary. He assigns six errors on appeal. We find merit only in the last, which concerns the sentence imposed. The trial judge directed that, *inter alia*, the sentence be served consecutively “*** to any time the defendant is [hereafter] ordered to serve as a result of parole violation in Montana if the defendant is returned to Montana before this sentence is served.” Imposing a sentence consecutive to an as yet unexecuted sentence is impermissible. See *State v. DeChenne*, 39 Or.App. 901, 594 P.2d 831 (1979); *State v. Ward*, 59 Or.App. 42, 650 P.2d 164 (1982).

The State agreed that, if the challenged phrase is deemed impermissible, it may be deleted without remanding the case for resentencing. See Or. Const., Art. VII (Amended), § 3. It is so ordered.

Judgment of conviction affirmed. Sentence modified by deleting requirement that defendant serve the term imposed consecutively to any sentence which may be imposed for parole violation in Montana.

State v. Mastrilli, 62 Or.App. 464, 661 P.2d 124 (1983). See also, *State v. Blevins*, 223 Neb. 864, 865, 394 N.W.2d 663, 664 (1986) (“We therefore hold it is impermissible for a sentencing court to require that a sentence, otherwise properly imposed, shall be served consecutively to a possible future sentence on pending criminal charges not disposed of at the time of the sentencing.”); *State v. Reed*, 237 Kan. 685, 703 P.2d 756 (1985).

In light of the foregoing, and in the absence of Idaho case law to the contrary, Judge Stow’s imposition of a sentence running consecutive to a future, unexecuted sentence is found to be improper by this Court on appeal.

The State urges this Court to make the needed modification to the sentence, if applicable, “so remand will not be required.” Respondent’s Brief, p. 7. And, Arnold asks the Court to simply delete the provisions requiring the sentence to be served consecutively to Arnold’s felony sentences. Brief of Appellant, p. 4. The Judgment orders incarceration “consecutive to any other sentence” and orders that Arnold report to the jail “now and/or to begin after any other sentence to run consecutively.” Judgment, p. 1. It appears that both parties have no objection to the Court simply interlineating these two phrases. Counsel for both parties made that clear at oral argument.

IV. CONCLUSION AND ORDER.

It was error for Judge Stow to add the language in the Judgment: “consecutive to any other sentence” and order Arnold report to the jail “now and/or to begin after any other sentence to run consecutively.” Judgment, p. 1. Arnold’s sentence in this case cannot be made consecutive to any other sentence other than by Judge Simpson, who sentenced Arnold on the felony charges. This is because Judge Stow had no other case with which to

sentence Arnold consecutively, whereas Judge Simpson had a different situation before him. Arnold's sentence in this misdemeanor case on appeal *existed* at the time Judge Simpson sentenced Arnold to prison. Judge Simpson could have sentenced Arnold's prison time on those felony counts consecutive to the local jail time imposed by Judge Stow on this misdemeanor, but did not. Judge Stow did not have the ability to sentence the misdemeanor to a sentence that did not at the time exist.

IT IS HEREBY ORDERED the portions of the December 3, 2010, Judgment of Magistrate Judge Stow which read: "consecutive to any other sentence" and order Arnold report to the jail "now and/or to begin after any other sentence to run consecutively", are STRICKEN, and to that extent only, the decision of Judge Stow is REVERSED.

IT IS FURTHER ORDERED Arnold's misdemeanor sentence of 365 days, imposed on December 3, 2010, and for which he received credit for time served in the amount of 30 days as of that date, at all times runs CONCURRENT to any sentence(s) imposed thereafter, and Arnold will receive credit for time served on this misdemeanor sentence while serving time in prison on his felony sentences.

DATED this 22nd day of June, 2011

JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of June, 2011 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Paul J. Szott
Prosecuting Attorney – Wes Somerton

Honorable James D. Stow
Honorable Benjamin R. Simpson

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY: _____
Deputy