

COURT OF APPEALS, STATE OF COLORADO 2 East 14 th Ave. Denver, CO 80203	
El Paso County District Court Honorable David A. Gilbert, District Judge Case Number [REDACTED]	
THE PEOPLE OF THE STATE OF COLORADO Plaintiff-Appellee v. [REDACTED] Defendant-Appellant	
<i>Appointed as Alternate Defense Counsel</i> <i>Attorneys for Defendant-Appellant:</i> Lucy H. Deakins, Reg. No. 41729 The Law Office of Lucy Deakins 7555 W. Amherst Ave., Box 36221 Denver, CO 80236 Telephone: 720-663-7101 Email: lucy@deakinslaw.com	▲ COURT USE ONLY ▲ Case Number: [REDACTED]
RENEWED FORTHWITH MOTION FOR LIMITED REMAND FOR DISTRICT COURT TO RULE ON EMERGENCY REDUCTION OF SENTENCE	

Defendant-Appellant [REDACTED] renews his request for a limited remand to return jurisdiction to the district court to rule on his renewed emergency motion for a reduction in sentence under Crim. P. 35(b) so that he can be immediately released from prison to prevent contracting and spreading COVID-19, and states:

The district court would have jurisdiction to rule on the 35(b) motion if this Court grants the limited remand.

1. [REDACTED] has filed a renewed emergency motion for a reduction of sentence under Crim. P. 35(b) in the district court. But, because his case is still on appeal, the district court does not have jurisdiction to rule on his motion unless this court grants a limited remand. *See People v. Dist. Court In & For Second Judicial Dist.*, 638 P.2d 65, 67 (Colo. 1981).
2. This Court previously denied Defendant's request for limited remand based on its reading of *People v. District Court*, 638 P.2d 65 and *People v. Bryce*, 2020 COA 57. In its order, this Court stated that the district court "lacks jurisdiction to hear a Crim. P. 35(b) motion unless the circumstances in subparts (2) or (3) of that rule have occurred."
3. However, in *People v. Dist. Ct.*, the Colorado Supreme Court held that in a "meritorious situation" the Court of Appeals has jurisdiction to grant a limited remand for a trial court to rule on a motion under Crim. P. 35(b). *Id.* at 67 ("Our resolution of the issue in this case does not rule out, in a meritorious situation, the filing of a request in the appellate court for a limited remand to the trial court to entertain a motion to modify the final judgment under appeal." (emphasis added)).

4. This is a meritorious situation. It is an “unprecedented public health crisis” and a “grave” “emergency”. Furthermore, without a remand from this Court, Mr. [REDACTED] will be without any avenue for relief through the courts in a situation that may literally be a matter of life and death. [REDACTED] is [REDACTED] years old and has been diagnosed with [REDACTED]. Renewed Mot., ¶ 8. Because of his incarceration, he has an exponential risk of contracting COVID-19, and because of his medical condition, he has a significant risk of serious illness or death from COVID-19. Renewed Mot., ¶¶ 4–9.

People v. Bryce is incorrect; the district court would have jurisdiction to decide the 35(b) motion if the Court of Appeals grants a limited remand.

5. A division of this Court recently held that a district court could not rule on a 35(c) motion during the pendency of an appeal, and therefore the Court of Appeals could not order a remand. *People v. Bryce*, 2020 COA 57, ¶ 3. *Bryce* was incorrectly decided.

The plain language of 35(b) is ambiguous.

6. The error in *Bryce* concerns the interpretation of the language of Rule 35(b)(3): a motion for sentence reduction must be filed “within 126 days (18 weeks) after” entry of the mandate. *Bryce*, ¶ 4 (“Our denial of this motion turns exclusively on the plain language requirements of Crim. P. 35(b).”). It appears

that Bryce interpreted this language to mean that the mandate must issue before the district court would have subject-matter jurisdiction to decide any 35(b) motion.

7. A superior and stronger reading in this case, however, would be to read the “within...after” language simply as describing the final date of a statute of limitations for filing under Rule 35(b). As we can see from the use of the same “within...after” language in various statutes, the language does not necessarily mean that the act cannot be performed prior to the triggering event, rather it is simply used to provide an anchor to calculate a floating date:
 - a. For example, offenders required to register under § 16-22-103, must register “within five business days after receiving notice of the duty to register[.]” § 16-22-108, C.R.S.; *see also* § 18-3-412.5(3.5) (similar). It would be absurd to read that language (“within...after”) to mean that if an offender had proactively registered before receiving notice, that registration was invalid. Receipt of the notice does not trigger the ability to register, it only anchors the calculation of the last date for registration.
 - b. Similarly, someone permitted to carry a concealed handgun must notify the issuing sheriff “within thirty days after a permittee changes the

address specified on his or her permit[.]” § 18-12-210, C.R.S. It would be absurd to read that language to mean that if a permittee notified the sheriff of an impending move the day before the move occurred, that would not satisfy the statute. Again, the rational reading is that the language simply describes the last date for registration; the move simply anchors the calculation of the last date for notification.

- c. Likewise, a late penalty is assessed for any restitution payment “that a defendant fails to make within seven days after the date that the payment is due[.]” § 16-18.5-105. But paying a restitution payment before the due date cannot possibly trigger a *late* penalty. That, again, would be absurd. The date due anchors the calculation of the last day for payment before penalty.

- 8. Thus, the only importance for timing of the mandate issuing under Rule 35(b) is that it anchors the calculation of the deadline for filing a 35(b) motion.

Rule 35(b) must be interpreted in accordance with Crim. P. 2.

- 9. To the extent that there is an ambiguity in the meaning of the language in the rule—does the language mean a 35(b) motion cannot be filed until the mandate issues or does it simply describe the last date for filing such a motion?—the

court must apply the various rules of statutory construction to determine the meaning of the rule. *People v. Angel*, 2012 CO 34, ¶ 17.

10. A rule must be interpreted consistently with “the intent of the rule and the fundamental purposes of the Colorado Rules of Criminal Procedure to provide for the just determination of criminal proceedings and to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.” *Id.* (internal quotation marks removed); Crim. P. 2. Thus, construction and interpretation of a rule of criminal procedure should support a “just” result, making the proceedings simpler, fairer, and quicker.

11. Indeed, when construing a statute or a procedural rule, a court must avoid an interpretation that leads to illogical or absurd results. *See People v. Cross*, 127 P.3d 71, 74 (Colo. 2006); *State v. Nieto*, 993 P.2d 493, 501 (Colo. 2000); *see also People v. Steen*, 2014 CO 9, ¶ 10 (the same interpretive rules apply to construing statutes and rules of criminal procedure);. Rather, a “just result” is intended. *People v. Moyer*, 635 P.2d 194, 195 (Colo. 1981).

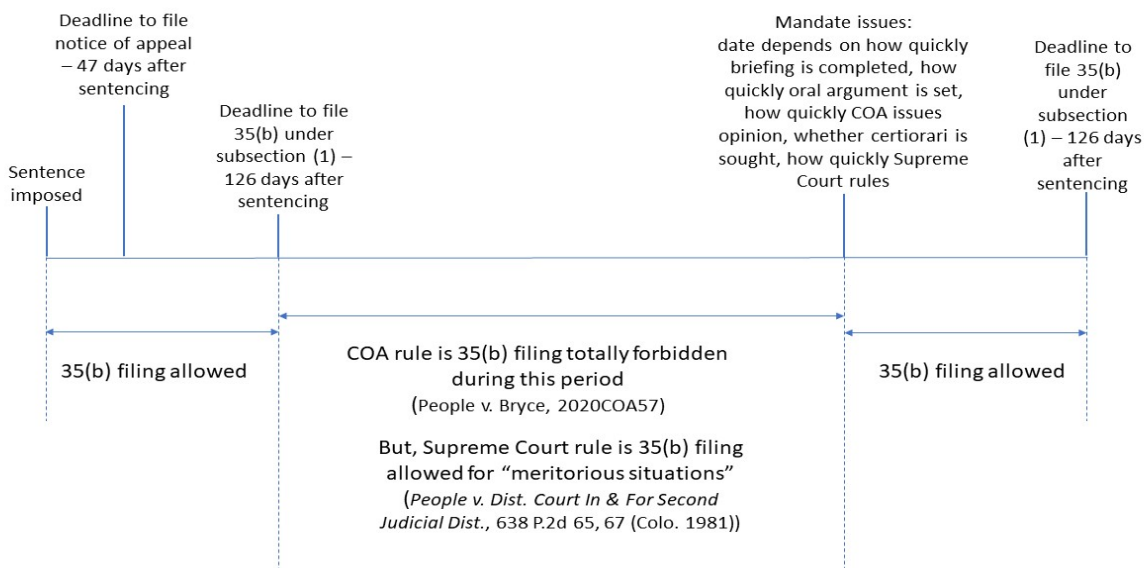
12. The Attorney General has argued elsewhere that “the *only* sensible interpretation of [a statute] is one that protects the health, safety, and well-being of all involved” during this pandemic. Renewed Emerg. Mot. for Reduction of

Sentence (“Renewed Mot.”) , Exhibit K, p. 24 (emphasis added). In contrast, other interpretations “would yield a manifest[ly] unreasonable, unjust, and absurd result.” *Id.* Similarly, the only sensible interpretation of Crim. P. 35(b) is one that allows the trial courts to hear motions for reconsideration of sentence to protect the health, safety, and well-being of defendants and the public. The alternative interpretation, from *Bryce*, is not only wrong on the law, it yields a manifestly unreasonable, unjust, and absurd¹ result.

Mistake regarding concurrent and subject-matter jurisdiction.

13. An additional problem with the analysis in *Bryce* appears to stem from a conflation of *concurrent* and *subject-matter* jurisdiction. Concurrent

¹ The rule from *Bryce* leads to this unnecessarily complicated timeline:



jurisdiction is the jurisdiction that a district court retains while a case is pending on appeal. *People v. Liggett*, 2018 COA 94M, ¶ 36. In the context of Crim. P. 35(b), subject-matter jurisdiction is the authority that a district court has to reduce a sentence before the conviction becomes final. *Herr v. People*, 198 P.3d 108, 111-12 (Colo. 2008).

14. In *People v. District Court*, the Supreme Court did not address a district court's subject-matter jurisdiction to rule on a Crim. P. 35(b) motion. It only addressed whether a district court has concurrent jurisdiction to rule on a Crim. P. 35(b) motion while a case is pending in the court of appeals. *See District Court*, 638 P.2d at 67.

15. This is abundantly clear because the Supreme Court specifically held that its decision “does not rule out, in a meritorious situation, the filing of a request in the appellate court for a limited remand to the trial court to entertain a motion to modify the final judgment under appeal.” *Id.* The Supreme Court could not have so held if the district court would have no jurisdiction on a limited remand.

The proper interpretation is that the district court has jurisdiction to decide a 35(b) motion on a limited remand from the Court of Appeals.

16. The proper interpretation of Rule 35(b) is that the Court of Appeals has authority to grant a motion for limited remand and the district court has

jurisdiction to decide the 35(b) motion. Such an interpretation is simpler than dealing with the timeline mandated by *Bryce*: first you can, then you can't, then you can file a motion. It is fairer as it does not force appellants to risk their lives in order to exercise their right to appeal. It is also quicker, as years can pass before a mandate is issued in an appeal.

17. The just interpretation, the one that comports with the law on jurisdiction, the one that takes into account the plain language of the rule without leading to an absurd result, and the one that comports with the Supreme Court's holding in *People v. District Court* is that the district court would have jurisdiction on a limited remand to rule on a 35(b) motion.

In the alternative, the 35(b) motion is late due to excusable neglect and should be accepted.

18. To the extent this Court hews to its previous decision that his motion is untimely, [REDACTED] motion should be accepted out of time under Crim. P. 45(b)'s excusable neglect provision. *See* Renewed Mot. at ¶¶ 14–17.

19. A limited remand should be granted to allow the trial court to rule on the issue of excusable neglect and the 35(b) motion.

20. [REDACTED] argument for sentence reconsideration has merit. He was originally eligible for a sentence to probation and he has risk factors that place him at an elevated risk of severe illness or death if he is infected with coronavirus. Renewed Mot. at ¶¶ 4–9.

[REDACTED] is not limited to remedies through the Department of Corrections.

21. The Attorney General has argued that [REDACTED] may only seek relief through the Department of Corrections. Resp. to [original] Mot. for Limited Remand, April 2, 2020. To the extent that [REDACTED] may someday have an avenue of relief through the Department of Corrections, there has been no explanation of the timeline for such relief and it appears it will likely be “too little, too late” to address his concerns during this unprecedented emergency. The Department of Corrections has, to date, refused to make any revised criteria for special needs parole publicly available, despite numerous requests from defense agencies.

[REDACTED] has no obligation to exhaust administrative remedies before pursuing reconsideration of his sentence.

22. Additionally, because [REDACTED] sentence is not yet final, *see, e.g., People v. Fuqua*, 764 P.2d 56, 59 (Colo. 1988), the courts retain jurisdiction to modify his sentence. *People v. Dist. Ct.*, 638 P.2d at 67.

23. Furthermore, Colorado has long recognized that the court’s “highest obligation is to observe and enforce the constitution[.]” *People ex rel. L’Abbe v. Dist. Court of Lake Cnty.*, 58 P. 604, 608 (Colo. 1899). That obligation cannot be delegated to the Department of Corrections, even after his sentence is final. *See, e.g., Lee v. Washington*, 390 U.S. 333 (1968) (one of many cases where the courts determined that conditions in a prison violated a prisoner’s constitutional rights and must be changed); *see also Todaro v. Ward*, 565 F.2d 48, 53 (2d Cir. 1977) (“While federal courts have traditionally adopted a broad hands-off attitude toward the daily problems of prison administration, ‘a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution.’”). Where, as here, Defendant has a legitimate and reasonable claim that his constitutional rights are being or are about to be violated, he is entitled to be heard by the court.

The pandemic is an unprecedented emergency and the State must reduce the risk to the prison population and the public by reducing the number of individuals in custody.

24. The Colorado Supreme Court has found that the coronavirus pandemic is “a virtually unprecedented public health crisis”, a “grave” public health disaster, an “emergency”, and “an extraordinary circumstance”. *In Re: Interrogatory on House Joint Resolution 20-1006*, 2020 CO 23, ¶¶ 29, 52, 53, 55 & 66.

25. Colorado is obligated to ensure the health and safety of prisoners in its custody.

§ 17-26-103, C.R.S.; *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (the Eighth Amendment bars the States from being deliberately indifferent to the known medical needs of prisoners). As the Attorney General itself has acknowledged, it is a “moral imperative” for the courts to protect people’s safety during this pandemic. Renewed Mot., Exhibit K, p. 23.

26. Governor Polis has issued an executive order and guidance to reduce the incarcerated population in this state to prevent the spread of COVID-19.

Renewed Mot., Exhibits A & F. The governor has encouraged the courts, prosecutors, and defense attorneys, to determine how to reduce the number of individuals in custody without creating a public safety risk. Renewed Mot. Exhibit F, p. 5, ¶ 15.

Conclusion

27. Even though the governor has encouraged prosecutors, defense attorneys, and

the courts to work together to reduce the number of individuals in custody without creating a public safety risk, Renewed Mot. Exhibit A, p. 5, ¶ 15, and

even though [REDACTED] has two risk factors for severe illness or death from coronavirus, was convicted of a non-violent crime, was eligible for probation, has had exemplary behavior in prison, and will be eligible for parole before the

end of the year, [REDACTED] expects an objection to this renewed request for limited remand from the Attorney General.

28. This court and the district court need to act fast because the coronavirus is spreading quickly and will “inevitably enter and expand exponentially in jails, prisons, community corrections, and juvenile detention facilities.” Emerg. Mot. Exhibit B, p. 4.

WHEREFORE, Appellant respectfully requests an immediate limited remand so that the district court may rule on his renewed emergency motion for a reduction in sentence under Crim. P. 35(b).

DATED April 8, 2020.

BY: /s/Lucy H. Deakins

LUCY H. DEAKINS, #41729

Counsel for Defendant-Appellant

CERTIFICATE OF SERVICE

I certify that on April 8, 2020 a copy of the foregoing ***RENEWED*** **FORTHWITH MOTION FOR LIMITED REMAND FOR DISTRICT COURT TO RULE ON EMERGENCY REDUCTION OF SENTENCE** was served via Colorado Courts E-filing on WILLIAM G. KOZELISKI at the Colorado Dept. of Law—Appellate Division, as attorneys for Plaintiff-Appellee, through their AG Criminal Appeals account.

By: /s/Lucy H. Deakins