APPENDIX A:

Colorado Appellate Court.

COLORADO COURT OF APPEALS

DATE FILED: March 29, 2018

Court of Appeals No. 17CA1349
Arapahoe County District Court No. 90CR171
Honorable Elizabeth A. Weishaupl, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Brian Anderson,

Defendant-Appellant.

ORDER AFFIRMED

Division VII
Opinion by JUDGE FREYRE
Bernard and Berger, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 29, 2018

Cynthia H. Coffman, Attorney General, Carmen Moraleda, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Brian Anderson, Pro Se

¶ 1 Defendant, Brian Anderson, appeals the trial court's order denying his Crim. P. 35(a) motion to correct an illegal sentence. We affirm.

I. Procedural Background

¶ 2 In a 1990 bench trial, the trial court found Mr. Anderson guilty of attempted first degree murder, second degree kidnapping, first degree assault, aggravated robbery, and first degree aggravated motor vehicle theft. The same person was the victim of the kidnapping and robbery convictions, which enhanced the kidnapping conviction from a class 3 to a class 2 felony. *See* § 18-3-302(3), C.R.S. 2017 (second degree kidnapping is a class 2 felony if the person kidnapped was a victim of a sexual assault or a robbery).

¶ 3 At sentencing, the trial court vacated Mr. Anderson's assault and aggravated robbery convictions.[1] The court then sentenced him to two consecutive forty-eight-year terms in the custody of the Department of Corrections (DOC) for the murder and kidnapping

---

[1] Mr. Anderson did not designate the sentencing transcript on appeal, and thus, we are unable to determine the court's reasons for vacating these convictions.

convictions and to a concurrent sixteen-year DOC term for the motor vehicle theft conviction. A division of this court affirmed his convictions and sentence. *See People v. Anderson*, (Colo. App. No. 91CA0029, June 25, 1992) (not published pursuant to C.A.R. 35(f)). In the ensuing years, Mr. Anderson filed several unsuccessful postconviction motions and appeals. *See People v. Anderson*, (Colo. App. No. 10CA0455, July 14, 2011) (not published pursuant to C.A.R. 35(f)); *People v. Anderson*, (Colo. App. No. 05CA2668, July 12, 2007) (not published pursuant to C.A.R. 35(f)); *People v. Anderson*, (Colo. App. No. 04CA1603, Sept. 1, 2005) (not published pursuant to C.A.R. 35(f)).

¶ 4 In 2015, Mr. Anderson filed a Crim. P. 35(a) motion in which he alleged that his enhanced forty-eight-year sentence for second degree kidnapping was illegal. He argued that when the trial court vacated his aggravated robbery conviction at sentencing, it could no longer use that conviction to enhance his second degree kidnapping conviction to a class 2 felony. He asked the postconviction court to re-designate his kidnapping conviction a class 3 felony. *See* § 18-3-302(4) (as relevant here, second degree kidnapping is a class 3 felony if the kidnapping was accomplished by use of a deadly

weapon but did not include a robbery). Mr. Anderson asserted that the trial court had vacated the aggravated robbery conviction based on the doctrine of merger.

¶ 5 The postconviction court denied the motion, finding that although the merger of the two convictions was "erroneous," the error did not affect the enhanced sentence, because the trial court had found that the kidnapping victim and the robbery victim were the same person. *See People v. Hogan*, 114 P.3d 42, 57-58 (Colo. App. 2004) (stating that a separate conviction for aggravated robbery does not merge with a conviction for second degree kidnapping involving a victim of a robbery); *People v. Huggins*, 825 P.2d 1024, 1026-27 (Colo. App. 1991).

¶ 6 Mr. Anderson then filed a motion for reconsideration of the denial of his Crim. P. 35(a) motion, in which he clarified his argument. The postconviction court denied this motion in 2017 and explained that a separate conviction for robbery was not required to enhance

the kidnapping sentence — only a finding that the kidnapped victim was also a victim of a robbery, which the trial court found here.[2]

II. Analysis

¶ 7 Mr. Anderson contends that the postconviction court erred when it found that a separate conviction for robbery was not required in order to enhance his second degree kidnapping conviction. We discern no legal error.

A. Standard of Review and Applicable Law

¶ 8 We review the legality of a defendant's sentence de novo. *People v. Chipman*, 2015 COA 142, ¶ 26. We also interpret statutes de novo. *People v. McLain*, 2016 COA 74, ¶ 9. In construing a statute, we look to the language and give words their ordinary and plain meanings. *Id.* When that language is clear, we apply it and need not resort to other rules of construction. *Id.*

¶ 9 Crim. P. 35(a) authorizes a court to (1) "correct a sentence that was not authorized by law . . . at any time"; and (2) "correct a sentence imposed in an illegal manner within the time provided

---

[2] The two-year delay between when Mr. Anderson filed his motion for reconsideration and the court's ruling was attributable to misplaced documents in the courthouse.

herein for the reduction of sentence." Crim. P. 35(a). A sentence is not authorized by law if it "is inconsistent with the statutory sentencing scheme outlined by the" legislature. *People v. Hard*, 2014 COA 132, ¶ 46 (using the term "illegal" to describe such a sentence).

¶ 10 Second degree kidnapping may be enhanced from a class 3 felony to a class 2 felony if, as relevant here, "[t]he person kidnapped is a victim of a robbery." § 18-3-302(3)(b), C.R.S. 2017.[3]

B. Application

¶ 11 Initially, we address the People's argument that Mr. Anderson waived his merger argument by abandoning it in on appeal. Construing his pro se pleadings liberally, we do not find his argument that the vacated aggravated robbery conviction could not be used to enhance or merge into the kidnapping conviction to be distinctly different from his argument that enhancement requires there to be a robbery conviction and absent that conviction, no enhancement can occur. *See People v. Bergerud*, 223 P.3d 686, 696-97 (Colo. 2010) (we construe pro se pleadings liberally).

---

[3] The statutory language was the same at the time Mr. Anderson was convicted.

Therefore, we discern no waiver. Nevertheless, we disagree with his contention.

¶ 12 The plain language of section 18-3-302(3)(b) does not require a *conviction* of robbery to enhance a second degree kidnapping conviction to a class 2 felony. *See People v. Aguilar-Ramos*, 224 P.3d 402, 404 (Colo. App. 2009). Rather, it requires the fact finder (here the trial court) to decide whether the prosecutor proved that the person kidnapped was also a victim of a robbery. *See People v. Powell*, 716 P.2d 1096, 1103-04 (Colo. 1986); *People v. James*, 117 P.3d 91, 96-98 (Colo. App. 2004). Thus, whether the court erred in vacating the aggravated robbery conviction (or in merging it) is not an issue we must decide because the parties do not dispute the fact that the victim of the second degree kidnapping and the aggravated robbery are the same person. *See James*, 117 P.3d at 96-98 (concluding that the evidence was sufficient to support the defendant's conviction for class 2 second degree kidnapping involving a victim of a robbery where the defendant was acquitted of committing aggravated robbery against the same victim and the jury was only required to find that the person kidnapped was a victim of an uncharged simple robbery); *see also Aguilar-Ramos*,

224 P.3d at 402-04 (upholding the defendant's conviction for class 2 second degree kidnapping involving a victim of a sexual assault even though he was acquitted of committing sexual assault against the same victim). Because Mr. Anderson's forty-eight-year DOC sentence falls within the aggravated sentencing range for a class 2 felony, we conclude that his sentence is legal.

III. Conclusion

¶ 13 The order is affirmed.

JUDGE BERNARD and JUDGE BERGER concur.

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: April 26, 2018
Arapahoe County 1990CR171	
Plaintiff-Appellee: The People of the State of Colorado, **v.** **Defendant-Appellant:** Brian Anderson.	Court of Appeals Case Number: 2017CA1349
ORDER DENYING PETITION FOR REHEARING	

The **PETITION FOR REHEARING** filed in this appeal by:
Brian Anderson, Defendant-Appellant

is **DENIED**.

Issuance of the Mandate is stayed until: May 25, 2018.

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, the stay shall remain in effect until disposition of the cause by that Court.

BY THE COURT
Bernard, J.
Berger, J.
Freyre, J.

APPENDIX B:

Arapahoe County,District Court.

DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO 7325 S Potomac Street Centennial, Colorado 80112	
THE PEOPLE OF THE STATE OF COLORADO **v.** **BRIAN ANDERSON,**	Δ COURT USE ONLY Δ Case Number: 90CR171 Division: 402
ORDER DENYING MOTION FOR CORRECTION OF AN ILLEGAL SENTENCE UNDER 35(A)	

THIS MATTER comes before the Court on the Defendant's Motion for Correction of an Illegal Sentence under 35(a). Having reviewed the Motion, the file, and being otherwise advised of the premises, the Court FINDS and ORDERS as follows:

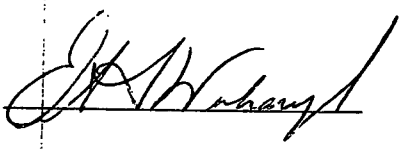
Defendant argues that his sentence for Second Degree Kidnapping should have been in the range for a class 3 felony rather than a class 2 felony because this Court merged his conviction for Aggravated Robbery with the conviction for Second Degree Kidnapping. Second Degree Kidnapping is a class 2 felony when, in addition to the normal elements of the offense, the person who was kidnapped was the victim of a robbery. § 18-3-302(3)(b) C.R.S.. Second Degree Kidnapping is a class 3 felony when, in addition to the normal elements of the offense, the defendant used a deadly weapon in the course of the kidnapping. § 18-3-302(4)(a)(II) C.R.S..

Although Defendant was convicted of both Second Degree Kidnapping and Aggravated Robbery of the same victim, he contends because this Court merged the conviction for Aggravated Robbery, the Victim was no longer also the victim of a robbery. Defendant is incorrect. The jury found that the person who was kidnapped was also the victim of a robbery. In Colorado, judicial merger has consistently been analyzed under double jeopardy principles. *People v. Henderson*, P.2d 1058, 1060 (Colo. 1991). Accordingly, the purpose of merger is to protect a defendant from being punished twice for the same act. *See id.* This Court's admittedly erroneous merger of the two convictions does not eliminate the findings of the jury that the Victim in this case was also a victim of a robbery.

Therefore, the Defendant's Motion is DENIED.

SO ORDERED, this 17 day of March, 2015

BY THE COURT



Elizabeth A. Weishaupl

District Court Judge

APPENDIX C:

Arapahoe County,District Court,**Reconsideration.**

DISTRICT COURT, COUNTY OF ARAPAHOE, STATE OF COLORADO 7325 S Potomac Street Centennial, Colorado 80112	DATE FILED: June 1, 2017
THE PEOPLE OF THE STATE OF COLORADO **Plaintiff** **v.**	Δ COURT USE ONLY Δ
BRIAN ANDERSON, **Defendant**	Case Number: 90CR171 Division: 402

ORDER DENYING MOTION FOR RECONSIDERATION

THIS MATTER comes before the Court on the Defendant's Motion for Reconsideration of the Court's Denial of Defendant's Motion for Reconsideration of Sentence Pursuant to Rule 35(a) of the Colorado Rules of Civil Procedures. The Court having read the one page Motion for Reconsideration having reviewed the Motion, the file, and otherwise being advised of the premises finds and orders as follows:

FACTUAL BACKGROUND

Anderson was convicted in 1990 of attempted first degree murder, second degree kidnapping and first degree aggravated motor vehicle assault. The judgment and sentence were affirmed on direct appeal, and mandate was issued. He filed numerous post-conviction motions, including a Rule 35(c). These post-trial motions were resolved and Anderson filed several appeals both to the Colorado Court of Appeals and the Supreme Court. The records were accordingly recompiled several times. After the last appeal the file and the record were stored in an off-site location. Anderson continued to file multiple pro se post-trial motions. These post-

trial motions were assigned to several judges in the 18th Judicial District and at some point it was transferred to division 402. Anderson filed a Motion for Relief pursuant to Crim. P. Rule 35(a) on January 20, 2015. That paper motion was eventually forwarded to the appropriate division and the Court ruled on that motion denying it on March 18, 2015.

On March 30, 2015, Defendant filed a one page Motion to Reconsider. Paper filings are sent to the criminal divisions which previously had the case. The Court had been transferred into a civil division. Loose paper filings were kept in red-file storage in the basement of the Court or were transferred into divisions which may have had contact with that file in the past. The original motion to reconsider was not seen by Division 402. As stated above, the file itself was stored offsite in a remote location. Mr. Anderson began to file notes asking for status on his motion. The Court requested the file from offsite and staff reviewed the file. No Motion to Reconsider was brought to the attention of the Court. It therefore believed that his status notes referred to his Crim. P. 35(a) motion and assuming that he had not received the order directed staff to forward an additional copy of the order to Mr. Anderson. When Mr. Anderson persisted on requesting status on a motion to reconsider, which the Court and staff still had not seen, the Court again requested the file from offsite and staff in reviewing the file found a Supplemental Motion had been filed, but again did not find the one page Motion to Reconsider. Knowing that Mr. Anderson wanted the Court to reconsider its order from the status notes, the Court erroneously concluded that the Supplemental Motion, contained in the file, which was five pages in length was the motion to reconsider. It therefore issued the order dated August 1, 2016 which concerns the Crim P. 35(c) issues raised in that supplemental pleading.

Thus, when Mr. Anderson filed repeated requests for status after that order was issued, the Court pulled the file, looked at its orders and determined that the order requested had been

issued. The Court returned the file to storage and at some point in time the loose bits of pleadings were put into the file. When the error was brought to the Court's attention, the Court again requested all the files that the Court has in storage. In reviewing the file as it is comprised now, the Court found the one page form Motion to Reconsider and now understands that the assumption it made regarding the argument contained in the supplemental pleading was in error.

The Court now will reconsider the Motion to Reconsider under Rule. 35(a).

STANDARD OF REVIEW

A court may correct a sentence that was not authorized by law or that was imposed without jurisdiction at any time and may correct a sentence that has been imposed in an illegal manner. *People v. Martin*, 987 P.2d 919 (Colo. 1999); Crim. P. 35(a).

DISCUSSION

In the initial motion, Anderson argued that the sentence which was imposed "was not authorized by law." *See* Motion for Correction of an Illegal Sentence at pg. 1. The motion consisted of legal citations and then paragraphs of unrelated argument. Anderson also cited sentencing transcripts, without attaching transcripts, in which he argued that the sentencing Court had merged the charge of aggravated robbery into Count No. 2 and vacated the charge of aggravated robbery. *Id.* He then argued that the second degree kidnapping charge became a class 3 felony. *Id.* at p. 4, 2nd partial paragraph. Based on merger/vacation by the Court Anderson alleged that aggravated robbery cannot merge into second degree kidnapping and that the enhanced sentencing he received was "illegal" based upon his review of the law. Reading between the lines, the Court gleaned that Anderson believed that an improper sentencing

enhancer had been used in his sentence. The third and fourth pages of the motion contained information about his background and irrelevant information about his mental health.

The Court interpreted his pleading as a request for a ruling on the merger/enhancer issue and denied the motion finding that:

> Defendant argues that his sentence for Second Degree Kidnapping should have been in the range for a class 3 felony rather than a class 2 felony because this Court merged his conviction for Aggravated Robbery with the conviction for Second Degree Kidnapping. Second Degree Kidnapping is a class 2 felony when in addition to the normal elements of the offense the person who was kidnapped was a victim of a robbery. § 18-3-302(3)(b), C.R.S. Second Degree Kidnapping is a class 3 felony when in addition to the normal elements of the offense the Defendant used a deadly weapon in the course of the kidnapping. § 18-3-302,(4)(a)(II), C.R.S.
>
> Although Defendant was convicted of both Second Degree Kidnapping and Aggravated Robbery of the same victim, he contends because this Court merged the conviction for Aggravated Robbery, the Victim was no longer the victim of a robbery. Defendant is incorrect. The Jury found that the person who was kidnapped was also the victim of a robbery. In Colorado, judicial merger has consistently been analyzed under double jeopardy principles. *People v. Henderson*, 810 P.3d 1058 , 1060 (Colo. 1991). Accordingly, the purpose of merger is to protect a defendant from being punished twice for the same act. *See id.*

See Order of March 18, 2015. It therefore denied the Motion.

Now in reviewing the one page form Motion for Reconsideration, the Court understands that Anderson has changed and redefined his argument. Now Anderson argues that "Trial Judge Stuart vacated the conviction, verdict and sentence for the aggravated Robbery and then merged the Aggravated Robbery into the 2nd Degree Kidnapping and enhanced the sentence."

The Court has reviewed the Mittimus attached to the Record and Contained in the File and the Opinion in 05CA2668. The Court notes that:

> Anderson was convicted of attempted first degree murder and second degree kidnapping, both class two felonies, first degree assault and aggravated robbery, both class three felonies, and first degree aggravated motor vehicle theft, a class four felony. The court

> sentenced him to forty-eight years in the custody of the Department of Corrections (DOC) on the attempted murder conviction, a consecutive term of forty eight years in the DOC on the kidnapping conviction, and a concurrent term of sixteen year in the DOC on the aggravated motor vehicle theft conviction. It vacated the other two convictions.

See *People v. Anderson*, 05CA2668 (July 12, 2005) (Unpublished Record On Appeal, 10CA455, Vol. IV at p. 655)

The mittimus reveals only that Defendant was convicted by a jury of his peers of Count 1, Criminal Attempt to Commit Murder in the First Degree, Count 2, Second Degree Kidnapping, and Count 5 Aggravated Motor Vehicle Theft. The Defendant was sentenced to forty eight years on count 1 and forty-eight years on Count 2. Those two sentences were to run consecutively. He was then sentenced to 16 additional years on count 5. The jury had also convicted him of first degree assault and robbery. However, these two charges were vacated and were not the subject of sentencing.

The gist of Anderson's most recent argument is the 48 year sentence for attempted first degree murder and the consecutive term of 48 years for the second degree kidnapping were in error. He contends that once his Aggravated Robbery conviction was vacated that the Second Degree Kidnapping charge could not stand, as it was, absent the Aggravated Robbery Conviction, by statute a Third Degree Kidnapping, and a lessor felony. Anderson's argument is in error.

Anderson does not dispute that his 48 year sentence for attempted homicide is appropriate. He also does not dispute that his 16 year sentence for the Motor Vehicle Theft is appropriate. With regard to the Second Degree Kidnapping charge, Anderson misunderstands the effect of the vacation of the Aggravated Robbery Charge. The Aggravated Robbery Charge was not used as an "enhancer." Whether or not he was convicted of Aggravated Robbery is irrelevant to whether or not he was convicted of Second Degree Kidnapping. Rather the factual

issue of whether or not the kidnapping occurred during a robbery is relevant to the Second Degree Kidnapping Charge. To be convicted of Second Degree Kidnapping the jury had to find as an element of that charge that a robbery occurred. *See* §18-3-302. Without such a finding the jury would have had to find him not guilty of this charge. The Court has reviewed the statute from the time of the conviction and finds that it has not changed in any fundamental way. Thus the jury as part of finding him guilty of Second Degree Kidnapping necessarily found that the kidnapping occurred during a robbery. Thus, it is immaterial whether or not Anderson was ultimately convicted of robbery, whether or not he was sentenced for robbery, or whether or not the Court vacated the charge. A party can be convicted of one charge and not convicted of another. The jury is instructed that they are to consider each charge individually. As it stated in its prior ruling "the Jury found that the person who was kidnapped was also the victim of a robbery." Thus, the Court finds no error in the sentence and no reason to reconsider its earlier denial of the Crim. P. Rule 35(a) motion.

The Motion to reconsider is therefore DENIED.

SO ORDERED, this 1 day of June, 2017

BY THE COURT

COMBINED COURT SEAL ARAPAHOE COUNTY COLORADO

Elizabeth A. Weishaupl
District Court Judge

APPENDIX D:

Colorado Supreme Court.

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: September 17, 2018
Certiorari to Court of Appeals, 2017CA1349 District Court, Arapahoe County, 1990CR171	
Petitioner: Brian Anderson, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2018SC373
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, SEPTEMBER 17, 2018.

ATTACHMENT:

Petitioner Brian Andersons **Mittimus** is included.It shows all the Charges the Petitioner was **convicted** of.

Exhibit #1

WORKING FILE

DISTRICT COURT COUNTY OF Arapahoe STATE OF COLORADO	JUDGMENT OF CONVICTION: SENTENCE: AND ORDER TO SHERIFF (MITTIMUS)	Case Number 90CR171 Div/Ct Rm 6

PEOPLE OF THE STATE OF COLORADO vs BRIAN ANDERSON

Defendant

PEOPLE OF THE STATE OF COLORADO to the Sheriff of Arapahoe County, *and the Executive Director of the Colorado Department of Corrections. On 11/26/90, the Defendant named above was present in Court, and was represented by Dan Bowen. The People were represented by John Hower. The Defendant was arraigned in this Court upon an ~~Indictment~~, *Information, *~~Amended Information previously filed~~, to which the Defendant entered a plea of *~~Guilty~~, *Not Guilty, *~~Nolo Contendere~~, and *was found Guilty, *~~which plea of Guilty was accepted~~, *by a verdict of the jury, *by the Court, of the offense(s) of:** Count 1, CRIMINAL ATTEMPT TO COMMIT MURDER IN THE FIRST DEGREE, Section 18-2-101 and 18-3-102, F2; Count 2, SECOND DEGREE KIDNAPPING , Section 18-3-302, F2; Count 5, AGGRAVATED MOTOR VEHICLE THEFT IN THE FIRST DEGREE, Section 18-4-409(2), F4.

DATE OF OFFENSE- 1/1/90

THE COURT has given the Defendant an opportunity to make a statement, and to present any information in mitigation of punishment. The People have been given an opportunity to be heard on any matter material to the imposition of sentence. It is now the Judgment and Sentence of the Court that the Defendant be sentenced *to the ~~County Jail~~ at custody of the Executive Director of the Department of Corrections *~~to the~~ Canon City, Colorado for a term of forty eight (48) years on count 1. Deft. sentenced to DOC for forty eight (48) years on count 2. Deft. sentenced to sixteen (16) years at DOC on count 5.

plus any term of parole authorized by Section 17-22.5-303(6), C.R.S.

~~plus one year of parole (strike for Class 1)~~

~~and a fine of $ _____ and costs of $ _____~~ JUDGMENT OF CONVICTION IS NOW ENTERED.

THE COURT finds that the Defendant has spent 328 days in confinement prior to this date for the offense(s) for which the defendant is being sentenced.

IT IS FURTHER ORDERED OR RECOMMENDED: the sentences on counts 1 and 2 are to run consecutively to each other. The sentence on count 5 is to run concurrently to counts 1 and 2.

COLORADO
DEPARTMENT OF CORRECTIONS
RECEPTION & DIAGNOSTIC CENTER
RECORDS OFFICE

NOV 30 1990

INMATE No. 64193

RECEIVED

THEREFORE, IT IS ORDERED that the Sheriff of Arapahoe County shall safely convey the Defendant to the *Colorado State Department of Corrections Diagnostic Unit at Canon City, Colorado, *the ~~County Jail at~~, ~~Colorado~~, to be received and kept as provided by law.

COURT REPORTER
Carla Capritta

11/26/90 Date

Judge
KENNETH K. STUART

*Strike as to form.
**Indicate statutory section, subsection, and class after each count.