9-6-2011

# State v. Barnes Respondent's Brief Dckt. 37995

IN THE SUPREME COURT OF THE STATE OF IDAHO



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| STATE OF IDAHO, | ) | |
| | ) | |
| Plaintiff-Respondent, | ) | NO. 37995 |
| | ) | |
| vs. | ) | |
| | ) | |
| MARJORY ANN BARNES, | ) | |
| | ) | |
| Defendant-Appellant. | ) | |
| | ) | |

# BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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## STATEMENT OF THE CASE

### Nature Of The Case

Marjory Ann Barnes appeals from the judgments of conviction entered after a jury found her guilty of trafficking in methamphetamine by manufacture, manufacture of a controlled substance where a child is present, possession of a controlled substance with intent to manufacture methamphetamine, and conspiracy to traffic in methamphetamine. Barnes claims, for the first time on appeal, that (1) she suffered a double jeopardy violation as a result of her convictions for both trafficking in methamphetamine by manufacture and possession with intent to manufacture methamphetamine, and (2) there was a fatal variance between the charging document and the jury instructions in relation to the conspiracy charge.

### Statement Of Facts And Course Of Proceedings

Following a report of concerns that Barnes and Gregory Klundt may be manufacturing methamphetamine, law enforcement obtained a warrant to search their residence. (R., Vol. I, pp.12-13, 20-25.) The search conducted pursuant to the warrant revealed a number of items associated with the manufacture of methamphetamine. (R., Vol. I, pp.16-18; see generally Trial Tr., pp.69-79, 94-119.)

The state charged Barnes with trafficking in methamphetamine by manufacture, manufacture of a controlled substance where a child is present, possession of a controlled substance with intent to manufacture

methamphetamine, and conspiracy to traffic in methamphetamine.[1] (R., Vol. I, pp.27-30, 45-48.) The state also filed a motion to join Barnes' case with Klundt's case, which the court granted.[2] (R., Vol. I, pp.51-52, 60.)

After trial, the jury found Barnes guilty of all four counts alleged. (R., Vol. II, pp.344-345.) The court imposed concurrent fixed five-year sentences for trafficking, possession with intent to manufacture methamphetamine, and conspiracy to traffic in methamphetamine, and a consecutive indeterminate two-year sentence for manufacture of a controlled substance where a child is present. (R., Vol. II, pp.372-373.) Barnes filed a timely notice of appeal. (R., Vol. II, pp.379-381.)

[1] During trial, the state filed an Amended Information, eliminating one of the overt acts alleged in the original Information and modifying the date and point of purchase in relation to another overt act. (Compare R., Vol. I, p.47 with R., Vol. II, p.237 (overt act alleged in ¶ 2 of original Information eliminated in Amended Information); compare R., Vol. I, p.48, ¶ 9 with R., Vol. II, p.237, ¶ 8 (changing purchase date from March 14, 2009, to March 19, 2009, and point of purchase from Well Life to Walgreens.)

[2] Although Barnes' and Klundt's cases were joined for trial, they are not consolidated on appeal. Klundt's appeal, which raises the same issues Barnes raises in this appeal, is designated as Docket No. 38008 and is currently pending. (See Appellant's Brief, p.1 n.1.)

## ISSUES

Barnes states the issues on appeal as:

1. Was Ms. Barnes twice placed in jeopardy for the same offense when she was convicted and was sentenced for both the greater offense of trafficking in a controlled substance by manufacture, and the lesser-included offense of possession of a controlled substance, to wit pseudoephedrine, with the intent to traffic?

2. Did the district court create a fatal variance from the State's Indictment when it failed to limit the elements instruction for conspiracy to traffic in methamphetamine to those overt acts as alleged in the Information?

(Appellant's Brief, p.4.)

The state rephrases the issues on appeal as:

1. Has Barnes failed to demonstrate fundamental error based on her claim that she was twice placed in jeopardy as a result of her convictions and sentences for trafficking in methamphetamine by manufacturing and possession of a controlled substance with intent to manufacture?

2. Has Barnes failed to show a variance between the Amended Information and the jury instructions, much less a fatal variance resulting in fundamental error?

## ARGUMENT

### I.
### Barnes Has Failed To Demonstrate Fundamental Error Based On Her Double Jeopardy Claim

### A. Introduction

Barnes contends, for the first time on appeal, that her right to be free from double jeopardy was violated "when she was convicted and punished for the greater offense of felony trafficking in methamphetamine by manufacture, as well as the lesser-included offense of possession of a controlled substance, to wit pseudoephedrine, with the intent to manufacture." (Appellant's Brief, p.5.) Barnes' claim fails because she cannot establish the error she alleges was fundamental.

### B. Standard Of Review

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, ___, 245 P.3d 961, 979 (2010).

Whether a defendant's prosecution complies with the constitutional protection against double jeopardy is a question of law subject to free review. State v. Santana, 135 Idaho 58, 63, 14 P.3d 378, 383 (Ct. App. 2000).

C. Barnes Has Failed To Show Fundamental Error In Relation To Her Double Jeopardy Claim

There are three separate guarantees embodied in the Double Jeopardy clause: protection against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. Illinois v. Vitale, 447 U.S. 410, 415 (1980) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969) (footnotes omitted)); State v. Corbus, 151 Idaho 368, 256 P.3d 776 (Ct. App. 2011). "In contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy – protection against cumulative punishments – is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." Ohio v. Johnson, 467 U.S. 493, 499 (1984). Thus, the question under the double jeopardy clause whether punishments are "multiple" is essentially one of legislative intent. Id.; see also Missouri v. Hunter, 459 U.S. 359, 366 (1983) ("With respect to cumulative sentences in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.").

Barnes concedes her double jeopardy claim is not preserved for appeal, but argues she is nevertheless entitled to relief because the error is fundamental. (Appellant's Brief, pp.5-6.) Barnes is incorrect.

Under the Idaho Supreme Court's recent opinion in Perry, unobjected to claims of constitutional error are reviewed using a three-part test:

> (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated, (2) the error must be clear or obvious, without the need for any additional

> information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights meaning (in most instances) that it must have affected the outcome of the trial proceedings.

150 Idaho at ___, 245 P.3d at 978. Application of these standards to Barnes' claim of error demonstrates she has failed to meet her burden of establishing she is entitled to relief.

The first prong of Perry requires Barnes to demonstrate a constitutional violation. Barnes argues she has satisfied this step in the analysis because, she asserts, "under the 'pleading' theory, possession of a controlled substance with the intent to manufacture, as charged by the State, is a lesser included offense to trafficking in methamphetamine by manufacture." (Appellant's Brief, p.9.) Thus, Barnes asserts, she was "punished twice for the same criminal act" and "her conviction for possession of a controlled substance with intent to manufacture should be vacated." (Appellant's Brief, pp.9-10.) The flaw in Barnes' argument is that it relies on the false premise that Idaho has adopted "the broader 'pleading theory'" for determining what constitutes a lesser included offense versus the statutory theory. (Appellant's Brief, p.8.) The Idaho Court of Appeals recently explained in Corbus, 151 Idaho at ___, 256 P.3d at 779, that this is not necessarily the case; a conclusion subsequently supported by the Idaho Supreme Court's opinion in State v. Flegel, 2011 WL 3890343 (Idaho Sept. 6, 2011).

In Corbus, the Court stated: "Our review of Idaho Supreme Court precedent demonstrates that the Court has not been entirely consistent in its

application of either the *Blockburger*[3] [statutory] test or the pleading theory in double jeopardy cases." 151 Idaho at ___, 256 P.3d at 782. The Court of Appeals noted that a review of Idaho Supreme Court precedent could lead to the conclusion that "when a defendant brings a double jeopardy claim under both the Idaho and United States Constitution, . . . the pleading theory [applies] to determine whether there has been a violation of the Double Jeopardy Clause under the Idaho Constitution and the *Blockburger* test [applies] to determine whether there has been a violation under the United States Constitution." Id. The Court, however, found this "conclusion is called into question" based on other Idaho Supreme Court precedent where the Supreme Court "seem[ed] to apply an elements theory more akin to *Blockburger* . . . in Idaho constitutional claims." Id. In light of the Idaho Supreme Court's recent opinion in Flegel, the Court of Appeals was correct to call this conclusion into question. In Flegel, the Court applied both the statutory and pleading theories to determine whether sexual abuse is a lesser included offense of lewd conduct, expressing no preference for one test versus the other, and providing no indication that one test applies to state constitutional claims while the other applies to federal constitutional claims. 2011 WL 3890343.

At a minimum, the Blockburger test applies to Barnes' claim that her right to be free from double jeopardy under the United States Constitution was violated. Corbus, 151 Idaho at ___, 256 P.3d at 779. "The appropriate inquiry under *Blockburger* is whether each provision requires proof of a fact which the

[3] Blockburger v. United States, 284 U.S. 299 (1932).

other does not. The assumption underlying the *Blockburger* rule is that Congress ordinarily does not intend to punish the same offense under two different statutes." Ball v. United States, 470 U.S. 856, 861 (1985) (quotations and citations omitted).

Although Barnes asserts a violation of her double jeopardy rights under both the United States and Idaho Constitution (Appellant's Brief, p.5), on appeal, she only argues application of the pleading theory (see generally Appellant's Brief, pp.7-10). Because the pleading theory does not apply to an analysis under the Double Jeopardy Clause of the United States Constitution, Corbus, supra, Barnes has waived this aspect of her claim on appeal. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered.").

Even if the Court considers Barnes' claim under the United States Constitution, she cannot establish a double jeopardy violation under the Blockburger test. To be guilty of trafficking in methamphetamine, the state must prove, beyond a reasonable doubt, that a defendant (1) manufactured or attempted to manufacture methamphetamine; and (2) knew it was methamphetamine. I.C. § 37-2732B(a)(3); ICJI 406C. On the other hand, to be guilty of possession of a controlled substance, in this case, pseudoephedrine, with the intent to manufacture methamphetamine, the state must prove, beyond a reasonable doubt, that a defendant (1) possessed any amount of

pseudoephedrine; (2) knew or believed it was pseudoephedrine; and (3) intended to manufacture the pseudoephedrine. I.C. § 37-2732(a)(1)(A); ICJI 403A.

A review of the elements of both the trafficking statute and the possession with intent statute reveal that "each provision requires proof of a fact which the other does not." Ball, 470 U.S. at 861. Specifically, the trafficking statute requires actual manufacturing or an attempt to do so whereas the possession with intent offense only requires an intent to manufacture, with no actual manufacturing or attempt to manufacture required. Further, the possession with intent statute requires proof that the defendant actually possessed pseudoephedrine, while the trafficking statute includes no such element. The Idaho Court of Appeals succinctly explained the distinction between manufacturing a controlled substance and possession of the controlled substance with intent to deliver for purposes of double jeopardy in State v. Ledbetter, 118 Idaho 8, 13, 794 P.2d 278, 283 (1990):

> The facts establishing the statutory elements of manufacturing a controlled substance are different from the facts required to prove the elements of possessing a controlled substance with intent to deliver. Manufacturing is completed when a person produces or otherwise prepares the controlled substance. I.C. § 37-2701(m) (Supp. 1986). On the other hand, possession with intent to deliver does not require any production, possessing or synthesizing of a drug. The crime is complete upon actual or constructive possession coupled with the intent to transfer, or attempt to transfer, the substance to another person. I.C. § 37-2701(f) (Supp. 1986.) Each crime requires proof of an element not required by the other. Accordingly, we hold the separate convictions in this case do not violate the state and federal constitutional protection against double jeopardy.

The same rationale articulated in Ledbetter applies to Barnes' assertion that possession with intent to manufacture is a lesser included of manufacturing

under the pleading theory. Ledbetter, like Barnes, also argued "both offenses relate to the same course of conduct." 118 Idaho at 12, 794 P.2d at 283; compare Appellant's Brief, p.9 ("It is readily apparent that both charged offenses are based upon the same factual predicate."). The Court of Appeals in Ledbetter "agree[d] the two offense are closely related," but noted it is a "constitutionally permissible legislative choice" to separately punish "each step leading to the consummation of a transaction which it has the power to prohibit." 118 Idaho at 13, 794 P.2d at 283 (quotations and citations omitted). Although the Court did not separately analyze the statutory and pleading theories, it ultimately rejected Ledbetter's argument that the close relationship between the offenses invoked double jeopardy. Id.

Because Barnes cannot establish that possession with intent to manufacture is a lesser included offense of trafficking by manufacture under the statutory Blockburger theory or the pleading theory, she cannot establish a constitutional violation resulting from her conviction for both offenses. As such, Barnes' claim of error fails under the first prong of Perry.

Barnes' fundamental error double jeopardy claim also fails under the second prong of Perry. Under Ledbetter, supra, there would have been no basis for an objection to convictions for both trafficking by manufacturing and possession with intent to manufacture. In addition, as explained in Corbus, since Idaho case law is not clear on what theory should be applied to a double jeopardy claim, and where there is no violation under at least one theory, the error cannot plainly exist. 151 Idaho at ___, 256 P.3d at 780-783.

Because Barnes cannot satisfy either the first or second prong of the Perry analysis in relation to her double jeopardy claim, she has failed to establish any fundamental error resulting from her convictions for both trafficking in methamphetamine by manufacturing and possession of a controlled substance with intent to manufacture.

## II.
## Barnes Has Failed To Show Any Variance Much Less A Fatal Variance That Would Support A Claim Of Fundamental Error

### A. Introduction

Barnes argues, for the first time on appeal, that the "district court created an impermissible variance when it failed to limit the element [sic] instruction for conspiracy to traffic in methamphetamine to those overt acts alleged in the Information." (Appellant's Brief, p.10.) Barnes has failed to show any error, let alone fundamental error, entitling her to relief on this claim.

### B. Standard Of Review

Whether there is a variance between a charging document and the evidence and jury instructions at trial is a question of law given free review on appeal. State v. Sherrod, 131 Idaho 56, 57, 951 P.2d 1283, 1284 (Ct. App. 1998). Likewise, whether such a variance is fatal to the conviction is also given free review. Id.

C. Barnes Has Failed To Show A Fatal Variance Between The Amended Information And The Jury Instructions, Let Alone A Fatal Variance That Constitutes Fundamental Error

"A variance arises when the evidence adduced at trial establishes facts different from those alleged in the indictment." Dunn v. United States, 442 U.S. 100, 105 (1979). A variance may also occur where the jury instructions allow the jury to convict the defendant of the charged crime, but on one or more alternative theories other than what is alleged in the charging document. State v. Windsor, 110 Idaho 410, 716 P.2d 1182 (1985); State v. Montoya, 140 Idaho 160, 166, 90 P.3d 910, 916 (Ct. App. 2004). Not all variances are fatal because "there is a marked distinction between a 'mere variance' and a variance which is automatically fatal because it amounts to an impermissible 'constructive amendment.'" State v. Jones, 140 Idaho 41, 49, 89 P.3d 881, 889 (Ct. App. 2003) (quoting State v. Colwell, 124 Idaho 560, 565-566, 861 P.2d 1225, 1230-1231 (Ct. App. 1993)). A variance between the information used to charge a defendant and the instructions given at trial constitutes a due process violation if it deprives a defendant of fair notice of the charges against him or subjects him to a risk of double jeopardy. Montoya, 140 Idaho at 164-66, 90 P.3d at 914-16. A defendant is deprived of fair notice only if he was misled or embarrassed in the preparation or presentation of his defense. State v. Hickman, 146 Idaho 178, 182, 191 P.3d 1098, 1103 (2008).

The state charged Barnes with conspiring with Klundt, "to commit the crime of trafficking in methamphetamine by manufacture, in violation of I.C. § 37-

2732B(a)(3)." (R., Vol. II, pp.236-237.) In support of this charge, the state alleged the following overt acts:

> 1. On or about January 15, 2009, Marjory Barnes purchased pseudoephedrine in Rathdrum with the intent to manufacture methamphetamine.
>
> 2. On or about January 30, 2009, Gregory Klundt purchased pseudoephedrine from Shopko with the intent to manufacture methamphetamine.
>
> 3. On or about February 1, 2009, Marjory Barnes purchased pseudoephedrine from Walgreens with the intent to manufacture methamphetamine.
>
> 4. On or about February 21, 2009, Gregory Klundt purchased pseudoephedrine from Albertsons with the intent to manufacture methamphetamine.
>
> 5. On or about February 25, 2009, Marjory Barnes purchased pseudoephedrine from Walgreens with the intent to manufacture methamphetamine.
>
> 6. On or about March 4, 2009, Gregory Klundt purchased pseudoephedrine from Walgreens with the intent to manufacture methamphetamine.
>
> 7. On or about March 7, 2009, Gregory Klundt purchased pseudoephedrine from Albersons [sic] with the intent to manufacture methamphetamine.
>
> 8. On or about March 19, 2009, Gregory Klundt purchased pseudoephedrine from Walgreens with the intent to manufacture methamphetamine.
>
> 9. On or about April 1, 2009, Gregory Klundt purchased pseudoephedrine from Walgreens with the intent to manufacture methamphetamine.
>
> 10. On or about April 15, 2009, Marjory Barnes purchased pseudoephedrine from Well Life with the intent to manufacture methamphetamine.

11. On or about April 16, 2009, Gregory Klundt purchased pseudoephedrine from Shopko with the intent to manufacture methamphetamine.

(R., Vol. II, pp.237-238.)

In relation to the conspiracy charge, the district court instructed the jury that Barnes was charged with "unlawfully, willfully and knowingly conspir[ing] and/or agree[ing] with Gregory Klundt to commit the crime of trafficking in methamphetamine by manufacture" and instructed the jury on all overt acts alleged in the Amended Information. (R., Vol. II, pp.286-287 (Instruction No. 6).) The court further instructed the jury that, in order to find Barnes guilty of conspiracy to traffic in methamphetamine, the state must prove, in relevant part:

. . .

3. the defendant, MARJORY ANN BARNES, and Gregory Klundt agreed;

4. to commit the crime of Trafficking in Methamphetamine by manufacturing;

5. the defendant intended that the crime would be committed;

6. one of the parties to the agreement performed at least one overt act;

7. such act was done for the purpose of carrying out the agreement.

(R., Vol. II, p.310 (Instruction No. 27).)

Barnes claims, for the first time on appeal, "[t]he fundamental mistake with the district court's elements instruction is that it did not limit the State, in its attempt to prove a conspiracy to traffic in methamphetamine, to the overt acts as alleged in the State's charging document." (Appellant's Brief, p.16.) Barnes also

asserts the district court "[f]urther complicat[ed] the issue" by "fail[ing] to provide the jury with a definition as to what is considered to be an 'overt act' under Idaho law." (Appellant's Brief, p.16.) Barnes' arguments lack merit and fail to satisfy any part of the Perry standard.

Barnes' argument fails under the first prong of Perry because she has failed to establish any variance, much less one that rises to the level of a due process violation. The jury instructions for conspiracy exactly reflect the charging document (compare R., Vol. II, pp.236-238 with pp.286-287) and the jury was accurately instructed on the elements of conspiracy (compare R., Vol. II, p.310 with ICJI 1101). While the conspiracy elements instruction itself does not list the overt acts, it specifically instructs the jury that it must find "one of the parties to the agreement performed at least one overt act." (R., Vol. II, p.310.) The other conspiracy instruction that includes the charge, in turn, lists the overt acts, which are specifically identified under the heading: "**OVERT ACTS**." (R., Vol. II, p.286 (emphasis original).) That Barnes may have preferred the instructions be drafted differently, or believes that an instruction defining "overt act" may have been helpful, does not mean there was an actual variance in this case. Her claim to the contrary lacks merit and she has failed to demonstrate a constitutional violation based upon a comparison of the Amended Information to the jury instructions.

Given the lack of any variance between the charging document and the jury instructions, Barnes' argument also fails under the second prong of Perry because there is no error, much less one that is "clear and obvious," such that

counsel should have objected to the instructions as given. Moreover, the record is inadequate to determine whether counsel's failure to object was tactical or based on some shortcoming capable of objective evaluation.

Barnes' variance claim also fails under the third prong of Perry because she cannot show that the failure to list the overt acts in the elements instruction "affected the outcome of the trial proceedings" for at least two reasons. First, the conspiracy instructions (R., Vol. II, pp.286-287, 310), when read together, clearly inform the jury that it must find at least one of the overt acts specifically charged in the Amended Information and listed in Instruction No. 6. See State v. Reid, 151 Idaho 80, ___, 253 P.3d 754, 758 (Ct. App. 2011) ("When reviewing jury instructions, the appellate court must determine whether the instructions, as a whole, fairly and adequately present the issues and state the law."). Second, there is no basis to conclude that the jury would have reached a different verdict had it been more specifically instructed that it could only consider the overt acts listed in Instruction No. 6 in order to find Barnes guilty of conspiracy instead of relying on other "acts" presented at trial that were not alleged in the Amended Information, such as Barnes or Klundt having one of Klundt's children buy pseudoephedrine. (Appellant's Brief, p.17.) This is particularly true given the substantial, competent evidence proving the specific overt acts alleged in the Amended Information. (Trial Tr., p.275, L.22 – p.276, L.3 (Barnes purchased pseudoephedrine on February 25, 2009 (R., Vol. II, p.237, ¶ 5)); p.276, Ls.13-17 (Klundt purchased pseudoephedrine on March 4, 2009, March 19, 2009, and April 1, 2009 (R., Vol. II, p.237, ¶¶ 6, 8; p.238, ¶ 9)); p.283, Ls.11 (Barnes

purchased pseudoephedrine on January 15, 2009, and February 1, 2009 (R., Vol. II, p.237, ¶¶ 1, 3)); p.290, Ls.3-7 (Klundt purchased pseudoephedrine on February 21, 2009 (R., Vol. II, p.237, ¶ 4)); p.291, Ls.15-19 (Klundt purchased pseudoephedrine on March 7, 2009 (R., Vol. II, p.237, ¶ 7)); p.296, Ls.3-8 (Klundt purchased pseudoephedrine on January 30, 2009, and April 16, 2009 (R., Vol. II, p.237, ¶ 2, p.238, ¶ 11)); p.303, Ls.9-15 (Barnes purchased pseudoephedrine on April 15, 2009 (R., Vol. II, p.238, ¶ 10)).

Because Barnes failed to show any variance, much less a fatal variance resulting in a constitutional violation that could support a claim of fundamental error, he has failed to demonstrate any basis for reversal.

## CONCLUSION

The state respectfully requests this Court affirm Barnes' convictions.

DATED this 6th day of September, 2011,

JESSICA M. LORELLO
Deputy Attorney General

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of September 2011, I caused a true and correct copy of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

GREG S. SILVEY
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JESSICA M. LORELLO
Deputy Attorney General

JML/pm