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State v. Wilkins Appellant's Reply Brief Dckt. 38117

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) DOCKET NO. 38117
)
 v.)
)
 TIMOTHY ROBERT DUANE WILKINS,) REPLY BRIEF
)
 Defendant-Appellant.)
 _____)

REPLY BRIEF OF APPELLANT

COPY

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

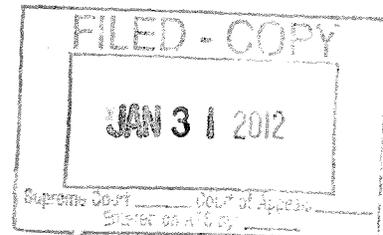
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STATEMENT OF THE CASE

Nature of the Case

On appeal, Mr. Wilkins argued that there was insufficient evidence to support his convictions and the persistent violator finding, that the district court erred when it relied on its own memory to find Mr. Wilkins to be a persistent violator, and that the district court abused its discretion by imposing an excessive sentence on his felony conviction.

In its Respondent's Brief, the State argues that the evidence was sufficient to support the convictions and persistent violator finding, that the district court did not rely on its own memory to support its persistent violator finding (or, in the alternative, that if the district court did so, such error was harmless beyond a reasonable doubt), and that the district court did not impose an excessive sentence.

This Reply Brief is necessary to address the State's arguments as to the sufficiency of the evidence supporting the persistent violator finding and the district court's reliance on its own memory in making that finding. While Mr. Wilkins continues to assert that there was insufficient evidence to support his convictions and that the district court imposed an excessive sentence, he will rely upon the arguments set forth in his Appellant's Brief as to those issues.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Wilkins's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference.

ISSUES

1. Was there sufficient evidence, in light of *State v. Lawyer*, 150 Idaho 170 (Ct. App. 2010), to support the persistent violator finding?
2. Did the district court rely on its own memory to support the persistent violator finding?
3. If the district court relied on its own memory, has the State met its burden to establish that such reliance was harmless beyond a reasonable doubt?

ARGUMENT

I.

The Evidence Was Insufficient, Even Under *State v. Lawyer*, 150 Idaho 170 (Ct. App. 2010), To Support The Persistent Violator Finding

The State, relying on the Idaho Court of Appeals' recent decision in *State v. Lawyer*, 150 Idaho 170 (Ct. App. 2010), argues that it presented sufficient evidence to support the persistent violator finding because the names and dates of birth on the two judgments of conviction were identical to Mr. Wilkins', both judgments were from prosecutions in the same county as the present offense, and "the prior crimes were similar to the current crimes." (Respondent's Brief, pp.11-13.) For the reasons set forth below, *Lawyer* is distinguishable from the facts of this case.

Lawyer concerned the sufficiency of evidence supporting a finding that the defendant had previously been convicted of felony driving under the influence within the preceding fifteen years, so as to trigger a DUI sentencing enhancement under then-Idaho Code § 18-8005(7). *Lawyer*, 150 Idaho at 172. The Court of Appeals considered whether the evidence presented by the State – that Lawyer's name and date of birth matched those on the judgment of conviction and that the judgment of conviction was for conduct that occurred in the same county – was sufficient to prove beyond a reasonable doubt that Lawyer was the person previously convicted. *Id* at 173. Ultimately, the Court of Appeals held, "the evidence of the previous conviction establishing the same name, same date of birth, *same offense*, and same county of conviction is sufficient to establish identity beyond reasonable doubt." *Id.* at 174 (emphasis added).

The key factor distinguishing *Lawyer* is that only one of the two prior convictions relied upon by the State was for the “same offense” as that for which he was convicted at trial. One of the prior convictions is for the same offense, “Possession of A Controlled Substance (Methamphetamine)” (Plaintiff’s Exhibit No. 9), while the other is for “Possession of a Controlled Substance with the Intent to Deliver[.]” (Plaintiff’s Exhibit No. 10.) From the context of the Court’s opinion, excerpted above, it appears that “same offense” means the same crime. Possession of a controlled substance and possession of a controlled substance with the intent to deliver are not the same crime. As such, *Lawyer* can and should be distinguished based on the Court’s explicit holding.

II.

The District Court Relied On Its Own Memory To Support The Persistent Violator Finding

The State argues that the district court did not rely on its own memory to support its persistent violator finding. Specifically, the State claims that “an examination of the entire context of the district court’s comments” demonstrate that, while the district court “acknowledged his familiarity with Wilkins[.]” it did not “rely on any of his own specific personal knowledge of Wilkins’ prior convictions to find that he was a persistent violator.” (Respondent’s Brief, p.14.) After quoting the entirety of the district court’s comments making its finding and explaining its reasoning, the State argues, “[i]t is clear that the district court relied on the judgments offered by the state, and not on its familiarity with Wilkins[.]” and that “Wilkins has failed to meet his burden to affirmatively show that the district court’s mere acknowledgement of its familiarity with Wilkins contributed to its verdict finding that Wilkins was a persistent violator.” (Respondent’s

Brief, pp.14-16.) For the reasons set forth below, this Court should reject the State's argument.

A look at the district court's comments in context demonstrates that it relied on its memory – at least in part – to establish that Mr. Wilkins was the person named in the two judgments of conviction. In reaching its conclusion that Mr. Wilkins was the same person named in the judgments, the district court explained,

Well, the Court has before it Exhibits 9 and 10. Those exhibits appear to be authentic judgments for retained jurisdiction in Cases No. 07-10846 and 08-26542. They both pertain to Timothy Robert Duane Wilkins. The same name that this particular defendant has been identified is [sic]. They both pertain to the – and the Court did hear on the videotape and the officer's testimony that this defendant gave that name to the officer in particular. And that the date of birth listed in these judgments was [redacted] of 1973. The Court heard this particular individual on the videotape give that date of birth for himself to Corporal Lind. And the Court, also I have to say, has an independent memory of Mr. Wilkins as having been before the Court before. Without looking at these judgments, I could not have said what he has been convicted of, whether it was a felony or a misdemeanor, without reviewing the documents. *But I do recognize Mr. Wilkins. And when I look at these particular judgments I do recognize Timothy Robert Duane Wilkins of these judgments to be the Mr. Wilkins that is the Defendant in this particular case.*

(Tr., p.195, L.14 – p.196, L.9.)

The State's attempt to classify the above remarks by the district court as those of a "sensitive" court "wish[ing] to candidly acknowledge to the parties that he did, in fact, personally recognize Wilkins" is unpersuasive. In support of its argument, the State claims,

It is clear that the district court relied on the judgments offered by the state, and not on its familiarity with Wilkins, to find that Wilkins had been convicted of two prior felonies *as evidenced by the district court's specific discussion of the judgments submitted by the state, and its findings that those judgments reflected Wilkins' full name and date of birth.*

(Respondent's Brief, p.15 (citation to record omitted) (emphasis added).)

However, as the State acknowledges earlier in its briefing, merely establishing that the name and date of birth in a judgment of conviction are the same as those of the defendant is not sufficient to establish that the defendant is the same as the person in the judgment of conviction. (Respondent's Brief, pp.11-12 (citing *State v. Lawyer*, 150 Idaho 170 (Ct. App. 2010).) In *Lawyer*, the Idaho Court of Appeals held that "evidence of the previous conviction establishing the same name, same date of birth, same offense, and same county of conviction is sufficient to establish identity beyond a reasonable doubt." *Lawyer*, 150 Idaho at 174.

At trial on the persistent violator enhancement, defense counsel argued that merely establishing that the name and date of birth on judgments of conviction were the same as Mr. Wilkins' was not sufficient to establish beyond a reasonable doubt that Mr. Wilkins was the same person previously convicted. (Tr., p.192, L.23 – p.193, L.16.) In response, the State argued that the fact that Mr. Wilkins' name "is not a common name" and the match between his name and date of birth and those contained in the judgments of conviction was sufficient to establish his identity beyond a reasonable doubt. (Tr., p.194, L.25 – p.195, L.12.)

Immediately following these arguments, the district court assessed the identity evidence, and explained that it recognized Mr. Wilkins as being the same as the person named in the judgments of conviction, concluding, "I do recognize Timothy Robert Duane Wilkins of these judgments to be the Mr. Wilkins that is the Defendant in this particular case." (Tr., p.195, L.14 – p.196, L.9.) This additional context supports an inference that the district court was grappling with the sufficiency of the evidence

regarding identity, and attempting to reconcile the defense argument with the State's argument.

The State did not argue that anything other than Mr. Wilkins' name and date of birth were necessary to establish that he was the person named in the judgments of conviction, let alone that the similarity of the crimes and the fact that they occurred in the same county provided further evidence of identity. (Tr., p.194, L.25 – p.196, L.9.) It would have been difficult for the State to have done so given the fact that *Lawyer* was not issued until three months after the persistent violator trial.¹ Given the parties' arguments and the comments of the district court, it is difficult not to conclude that the district court relied on its memory in finding Mr. Wilkins to be a persistent violator.

III.

The State Has Failed To Establish That The District Court's Reliance On Its Own Memory Was Harmless Beyond A Reasonable Doubt Under *Chapman*

In the alternative to its argument that the district court did not rely on its memory in finding Mr. Wilkins to be a persistent violator, the State argues,

In this case, any error was harmless because of the overwhelming evidence, as discussed above, that Wilkins had previously been convicted of two prior felonies. The state submitted two prior judgments from Kootenai County that referenced two separate felony drug convictions, and contained Wilkins' full and exact name, and Wilkins' full and exact date of birth. (Tr., p.190, L.25 – p.191, L.12; State's exhibits 9, 10.) Regardless of any erroneous consideration the district court gave to its previous familiarity with Wilkins, it still would have found Wilkins was a persistent violator absent that personal knowledge. Any error was thus harmless.

¹ *Lawyer* was issued on September 15, 2010; trial on the persistent violator enhancement was held on June 9, 2010. (Tr., p.182, L.1 – p.199, L.7.)

(Respondent's Brief, p.17.) For the reasons set forth below, this Court should reject the State's argument.

As the State acknowledges, because any error in the district court relying on its memory was objected-to, it has the burden of demonstrating that any such error was harmless beyond a reasonable doubt if it wishes to prevail in spite of the error. (Respondent's Brief, p.17 (citing *State v. Perry*, 150 Idaho 209 (2010)).) In *Perry*, the Idaho Supreme Court announced,

A defendant appealing from an objected-to, non-constitutionally-based error shall have the duty to establish that such an error occurred, at which point the State shall have the burden of demonstrating that the error is harmless beyond a reasonable doubt.

Id. at 222. In doing so, the Court recognized that it was applying the *Chapman*² harmless error test, originally developed for addressing error involving constitutional rights, to all objected-to error. *Id.* at 221-22.

The State cites no case law for its conclusion that the proper harmless error analysis is whether the district court would have made the same finding even without its reliance on its own memory. Nor could it have, given the requirements of the *Chapman* test. In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Supreme Court explained how the *Chapman* test is to be applied and not to be applied. *Id.* at 279. The Court noted, "Harmless-error review looks, we have said to the basis on which 'the jury *actually* rested its verdict.'" *Id.* (emphasis in original) (quoting *Yates v. Evatt*, 500 U.S. 391 (1991)). The Court elaborated, explaining,

The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to

² See *Chapman v. California*, 386 U.S. 18 (1967).

the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee.

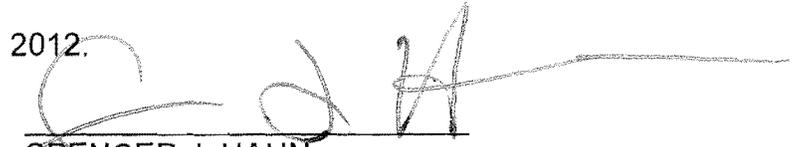
Id. at 279-80 (citations omitted) (emphasis in original).

Here, the State has sought to do just what the Court in *Sullivan* explained is not to be done in a *Chapman* harmless error analysis: argue what the verdict would have been had the error not occurred. The State has failed to meet its burden to demonstrate, beyond a reasonable doubt, that the persistent violator finding “was surely unattributable to the error.” As such, assuming this Court finds that the district court improperly relied on its own memory, thereby acting as a witness in violation of Idaho Rule of Evidence 605, it should reject the State's harmless error argument.

CONCLUSION

For the reasons set forth herein, and in his Appellant's Brief, Mr. Wilkins respectfully requests that this Court vacate the judgment of conviction and remand this matter to the district court for entry of judgments of acquittal on both charges. In the alternative, Mr. Wilkins requests that this Court vacate the district court's order finding that he was a persistent violator, and remand this matter for resentencing without a persistent violator enhancement, or alternatively, that it vacate and remand for a new trial on the persistent violator finding before a judge who is not a witness. Finally, if Mr. Wilkins is unsuccessful in these other claims, he respectfully requests that this Court order that he be placed on probation.

DATED this 31st day of January, 2012.


SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 31st day of January, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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