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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent v. SAMUEL CONAN REED, Defendant-Appellant	)	Supreme Court Case No. 37192-2009

APPELLANT'S REPLY BRIEF

Appeal from the Fourth Judicial District Court of the State of Idaho,
In and for Ada County

Honorable Judge Timothy Hansen, Presiding

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IN THE SUPREME COURT OF THE STATE OF IDAHO

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APPELLANT'S REPLY ARGUMENT

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REPLY ARGUMENT

Before proceeding with our Reply Argument to the merits of this Appeal, it is first necessary to correct the state's factual error in its historical reference to what they have chosen to characterize as Mr. Reed's misdemeanor history, when he pled guilty to the case before Magistrate Theresa Gardunia. The state has incorrectly stated Mr. Reed pled guilty to a second enhanced DUI. *See Responsive Brief*, p.1.

The state has made the factual assertion that:

> Approximately three months after his first case was dismissed, Mr. Reed was charged with his second DUI (*R.*, p. 51). The state also charged an enhancement in that case, which Mr. Reed unsuccessfully sought to have dismissed on the grounds that his first DUI had been dismissed and could not be used for enhancement purposes (*Id*). In that case, the district court rejected his argument and Mr. Reed pled guilty to the second, enhanced DUI (*Id*).

It is understandable where the state may have made this factual error as they were not a participant in those proceedings and may not have taken the opportunity to review the Magistrate Record to become aware of what transpired in that criminal proceeding. Essentially, Mr. Reed agreed he would tender a plea of guilty to the act of operating a motor vehicle while under the influence of alcohol or drugs, and it was then to be decided by the court upon briefing by the parties, whether the court could find, as a matter of law, it was a second enhanced DUI or, because of the Valley County Order of May 16, 2006, the event could only be charged as a first time DUI. The parties briefed the case; the magistrate conducted a hearing on the matter and during oral pronouncement, the court indicated it would be rendering a written decision, and when the written order was released by the court, it concluded the matter could be charged as a second enhanced DUI. The court then scheduled the matter for a disposition upon the court's decision, and defense counsel informed the Ada County Prosecuting Attorney,

Jeffrey White, Mr. Reed would appeal the disposition and the court's order. Ada County, being well aware of Defendant's intent to challenge the court's interpretation of Idaho's statute of the law on the subject, amended their complaint by interlineations at the time scheduled for the sentencing upon that offense. Mr. Jeffrey White announced to the court he was amending the complaint so as to allege a first time DUI, and no longer allege a second enhanced DUI, and by doing that, he took away our appeal issue at that stage of the proceedings. He urged the court to fashion a sentencing, however, consistent within the court's sentencing discretion, available to it under a first time DUI, which could take into consideration this was a second lifetime offense of an alcohol or drug influenced event, notwithstanding any argument whether the Valley County order precluded use of that case as a predicate basis for enhancement of penalties under the statute. The court exercised its discretion of being able to impose a sentence of up to six months on a first offense, and sentenced Mr. Reed in accordance with its authority under the statute, and consequently no appeal was deemed necessary to be taken from that disposition.

If the State of Idaho had conducted a more careful review of that in-court proceeding, they would have seen Mr. Reed has never been convicted of any enhanced misdemeanor DUI.

Another contention of concern raised by the state is addressed on page 2 of their responsive brief. They make the statement:

> In the State's response to the defendant's memorandum, the state asserted that the order dismissing the first DUI exceeded the statutory authority permitted by *I.C.* §19-2604, and that a case dismissed pursuant to a withheld judgment does not preclude the use of that case as a "prior DUI" in a later DUI proceeding under *I.C.* §18-8005 (5).(*R.*, pp. 50-58). After a hearing at which the district court heard argument from both parties (*see generally* 5/28/08 Tr.), the district court denied Reed's motion to dismiss, holding that a plea dismissed pursuant to *I.C.* §19-2604 could be used for enhancement purposes (*R.*, pp.72-75).

We respectfully take issue with any contention the Valley County Magistrate court exceeded its judicial authority, and nothing contained in the district court decision on appeal in this proceeding made any determination the magistrate's authority or jurisdiction had been abuse or exceeded. The Valley County Order of May 16, 2006, stands for what it says, and the issue in this appeal is the operative effect it has, either considering its particular language and the specific consequence it would have in light of *I.C.* §19-2604(1), under the former criteria of *Deitz*, or in the broader sense, as we view *Robinson*, the fact it is a order of dismissal, notwithstanding the form of the judgment or withheld judgment before entered, the dismissal has the operative effect of removing the plea of guilt or conviction from the record, and that order of dismissal is entitled to the full benefit of the operative effects of *I.C.* §19-2604(1). The district court did not declare the Valley County Magistrate Court had exceeded any statutory authority when entering the final Order of May 16, 2006, so there is no issue as the validity of that order. The district court did not endorse that contention as giving rise to any legitimate issue whatsoever. What the district court did, was merely a concept that was created within the Supreme Court Decision of *State v. Robinson*, 143 Idaho 366, 142 P. 3d 729 (2006), and took a wrong turn, and went in a direction that relies upon a misunderstanding of what we believe the Supreme Court actually intended. We believe the *Robinson* decision was designed to have the opposite effect to that envisioned by this district court.

What Judge Hansen concluded with respect to his analysis of the *Robinson* case, *supra*, is as follows:

> In reaching its decision, the Idaho Supreme Court specifically rejected any distinction under *I.C.* §19-2604(1) between a dismissal and a dismissal with a withdrawal of a defendant's guilty plea. As the Idaho Supreme Court noted, "(a) guilty plea in a criminal case would necessarily be vacated once dismissal in the underlying case is final.

This is true even if the order does not expressly state that the dismissal was being set aside (*Id*). Therefore, the distinction between the dismissal pursuant to the expungement statute in *Deitz* and the dismissal in the case at bar that is so crucial to defendant's argument is no longer applicable.

As this court may appreciate in reviewing our opening brief, Mr. Reed and counsel do not believe the *Robinson* case was crafted with any agenda or intent to destroy the operative effects of an order of dismissal in a DUI case, and its entitlement to the full effects of *I.C.* §19-2604(1), but rather the intent was to clarify the idea there had to be particular language in the order of dismissal that may have been brought about by the majority decision in *Deitz* that required the order of dismissal to unnecessarily recite the fact the court had first taken affirmative action to either vacate, set aside or withdraw the former plea of guilty, whether done before, or as a part and parcel of the order of dismissal. In essence, *Deitz* had a defendant hanging on a thread, depending upon how well his defense counsel or how well the court clerk or magistrate chooses to embellish or articulate the contents of the dismissal order, and to what extent the drafter incorporates aspects of §19-2604, *Idaho Code* into the final order of dismissal. The majority in *Deitz* required us to use the content of *I.C.* §19-2604(1), so as to "announce" the intended effect of the dismissal order to <u>also</u> eliminate the former plea of record, so there no longer is a former plea or conviction of record. We take *Robinson* to say that the act of the dismissal itself took away the former plea or conviction of record, and it was not necessary or was it anymore a legal requirement to first eliminate the plea, before or in conjunction with the dismissal, to get the full operative and intended beneficial effect of the statutory expungement provision in effect since 1924, which empowers courts to dismiss criminal cases, which includes the elimination of the plea of guilt, either as contemplated with

special language by our Court of Appeals in 1991 (*Deitz*) or requiring no special language as the concept has now been announced by our Supreme Court in *Robinson.*

That part of *Robinson* as quoted by Judge Hansen in his decision, has left our district court to believe the language in the May 16, 2006 order of dismissal now has no "meaningful purpose" because it did not have to be there, but a more correct way to have said what *Robinson* actually meant by way of what our district court quoted from it, is to say all content of *I.C.* §19-2604(1) is meaningful and has a purpose, and when a court elects to sign an order of dismissal in a criminal case, and that order is entered of record in a case pursuant to *I.C.* §19-2604, particularly when a withheld judgment had before been granted by the court, the effect of that order of dismissal contains or carries with it the elements of the setting aside, vacation or withdrawal of the plea, as that comes along with the order of dismissal, as a matter of law, and there is no need to have any special and additional language or reference to cause that intended result, as it becomes part and parcel with the order of dismissal envisioned by the court's authority under *I.C.* §19-2604.

Consequently, *Robinson* holds for the proposition that the language of the statute and its benefit conferred by the order of dismissal is meaningless or inoperative. In essence, the state of the law now holds that no special language addressing the removal of the former plea of guilt is necessary, since, as a matter of law, the plea of guilt is extinguished by the order of dismissal itself.

We believe *Robinson* was intended to set the record straight over what does appear to have some slight confusion created in the *Deitz* case in 1991. Essentially, it took fifteen years for our Supreme Court to revisit the specific content of an order of

dismissal under *I.C.* §19-2604, and defining whether it qualifies under the effects of *I.C.* §19-2604 or not, and no longer does the order have to recite those words that *Deitz* suggested needed to be contained within it to have the operative effects of that statutory enactment.

In essence, it is this appellant's belief the holding in the *Robinson* case was specifically intended to embrace the expressed thoughts of what the Honorable Jesse Walters said in his dissent in the *Deitz* case, which had left him with the abiding conviction the felony judgment should have been reversed and the matter remanded for further proceedings, as Mr. Deitz had an order of dismissal under *I.C.* §19-2604. We believe that is the intent of the *Robinson* case because there was no attempt to otherwise modify or undermine the general proposition of *Deitz* that endorsed the general consensus the operative effects of the expungement statute are there, and if you can eliminate the concern of a former plea of guilt to avoid enhanced penalties, but only as long as certain specific language is contained within the order. If the *Robinson* case wanted to undermine or defeat the operative effects of a dismissal order following a withheld judgment granted in a DUI case, that eliminates the exposure to enhancement, then the court had ample opportunity in the *Robinson* case to do so and say that. Instead, the *Robinson* case recognized it was confronted with two specific statutory enactments, each of which was constitutional and each of which had a right to be meaningful and enforceable, and the *Robinson* case and the court sought to enforce each of them accordingly. In doing so, *Robinson* held to the effect and selected specific language to say the following:

> It is presumed that the legislature knew that guilty pleas could be withdrawn and charges dismissed under I.C. § 19-2604(1). Perkins, 135 Idaho at 21, 13 P.3d at 348 (citing George W. Watkins Family v. Messenger, 118 Idaho 537, 540, 797 P.2d 1385, 1388 (1990); State v. Betterton, 127 Idaho 562, 563, 903

> P.2d 151, 152 (Ct.App. 1995)). Yet, the legislature did not specifically create an exception to the registration requirements for those who obtain such leniency when it easily could have written such an exception into the registration act. Instead, the legislature specifically made the registration act applicable to anyone who has a conviction for an enumerated offense and defined conviction as including anyone who has been adjudicated guilty of an enumerated sex offense "notwithstanding the form of the judgment or withheld judgment." I.C. § 18-8304(3); see also Perkins, 135 Idaho at 21, 13 P.3d at 348.[fn4] By adopting this definition of conviction and mandating that anyone convicted of an enumerated offense meet the requirements of I.C. § 18-8310 in order to be released from the registration requirements, the legislature made it clear that I.C. § 18-8310 is the only mechanism by which a sex offender can receive relief from the requirements of the registration act. See State v. Knapp, 139 Idaho 381, 383-84, 79 P.3d 740, 742-43 (Ct.App. 2003); Perkins, 135 Idaho at 21, 13 P.3d at 344. Only compliance with I.C. § 18-8310 releases a defendant from the reporting requirements of the registration act, and to decide differently would "contravene the express language of I.C. § 18-8304(3)." Perkins, 135 Idaho at 21, 13 P.3d at 344.
>
> (underlining emphasis ours)

We must bear in mind the phrase "notwithstanding the form of the judgment or withheld judgment" does not include the conveyance of an "ORDER OF DISMISSAL" that may or may not be entered afterwards.

The Expungement Statute of *I.C.* §19-2604 was created in 1924, and the legislature did not undertake to announce thereafter by any amendment that its application is excluded when it comes to DUI cases under the enhancement penalty statute. It did not exempt the effects of leniency afforded to defendants by court orders granting a defendant a dismissal of a criminal case when he pled guilty to a DUI. The dismissal order under *I.C.* §19-2604, and under *Robinson*, removed the plea of guilt from the record, and these is no exceptions to the effect of the leniency granted. When it comes to nullifying DUI pleas, the power of dismissal is granted to the courts, and the operative effect of the expungement statute is not the withheld judgments granted by the court, as the judgment could be either suspended or withheld by the court. The effect

comes only from the Order of Dismissal. Until the dismissal order is entered, the withheld judgment or suspended sentence still constitutes a guilty plea and a conviction of record, and a defendant is subject to the Enhancement Penalty Statute of Title 18, until he is granted the potential leniency as may be available to him by an order of dismissal under *I.C.* §19-2604. The legislature has not limited the court's power and more to the point, it specifically left in the enhancement penalty statute and the language there must be the former pleas or convictions entered that remain of record, before the enhanced penalty effects could be implemented under Title 18. The enhancement penalty statute does not undermine or limit the powers conferred by *I.C.* §19-2604.

Going back to *Robinson,* this Court went on to say:

> Moreover, by adopting I.C. § 18-8304(3), the legislature made clear that once a person has received a withheld judgment for an enumerated crime, they are brought within the purview of the [Registration] act, including I.C. § 18-8310, and the fact that a defendant later receives leniency under I.C. § 19-2604(1) does not remove him from the registration act.
>
> (underlining and [registration] emphasis ours)

The Registration Act does not require the plea of guilty remain of record; it requires the Defendant to have merely come under the purview of the act. The Enhancement Penalty Statute, §18-8005, *Idaho Code*, could have said that an order of dismissal under *I.C.* §19-2604 would not insulate a defendant from the effects of being exposed to enhancement penalties, notwithstanding the removal of the plea of guilt from the record. It was not the legislature's intent to do so, and nowhere does the statute say a subsequent court order of dismissal cannot eliminate a plea that before was entered in a judgment or withheld judgment predicated upon a plea of guilt or finding of guilt. Therefore, once an order of dismissal under *I.C.* §19-2604 is entered of record, as

occurred in this case in the order of May 16,2006, it becomes a different concept than just a judgment or a withheld judgment. It is now a court order of dismissal, with expungement effects, and if the result is to remove any determination of guilt that before existed, that is the purpose of the expungement, as there is no other statute in the Enhancement Penalty Statute, saying it provides some exclusive way to get relief, and not through *I.C.* §19-2604. Under the enhancement penalty statute, a court order of dismissal will change the landscape of what is of record to be found in a past case. On July 26, 2007, there was no form of a judgment or a withheld judgment in any court files that supports the presence of a guilty plea, as the court's subsequent ORDER specifically ordered the former plea of guilty unconditionally withdrawn, and the former plea of "not guilty" reinstated and emphasized the intended effects of its action by stating, "the (guilty) plea is deemed to have never been tendered to or accepted by the Court, and the entire case was dismissed with prejudice". Whether the language was needed to receive the effect of *I.C.* §19-2604, with just a dismissal only, the language clearly eradicated any guilty plea, beyond just the effects of the dismissal, as it was never tendered, never accepted, and the only plea recognized by the court was the former plea of "NOT GUILTY", the effect of that order is not just the withdrawal of the guilty plea, but the affirmative recognition it was never tendered to, nor accepted by the court, and never became a plea of record in the case before the court, and to such an effect, the court ordered reinstatement of the "not guilty" plea, is the only plea of record, as it was intended that only a "not guilty" plea be of record when the matter was dismissed with prejudice. The legislature surely would have understood that if the judgment or withheld judgment could be superseded by a court order that expunged the plea, let alone handle it

as Judge Boomer did with a non-tender, non-acceptance, and never to have been in the court record, and the record was ordered to reflect "not guilty" pleas only found anywhere in the record, and the charge dismissed then entirely, "a subsequent charge simply would not fit within the wording of that statute", as succinctly pointed out by Justice Walters when he expressed his dissenting opinion in *Deitz* that the dismissal alone was action enough under *I.C.* §19-2604 to remove the plea from the enhancement statute, regardless of verbiage about vacating, setting aside or otherwise addressing the plea of guilt that is to be eliminated. There could be no room for debate about the nullity effects of the order and the elimination of the enhancement penalty potential. When the former case law has declared dismissal itself created the nullity, the effect of saying it also had never been tendered to or accepted by the court is even a stronger confirmation there is no plea of record, as the event was erased entirely, and became a non-existent event. This concept of the dismissal itself was emphasized by Justice Walters where he stated that:

> In my view, I.C., § 18-8005(4), is ambiguous and – in light of the leniency policy afforded by I.C., § 19-2604 – should be construed narrowly in favor of the defendant. State v. Thompson, 101 Idaho 430, 614 P.2d 970 (1980); State v. Nab, 112 Idaho 1139, 739 P.2d 438 (Ct. of App. 1987).

His analysis of what was meant in 1991 by the inclusion of the phrase, "notwithstanding the form of the judgment(s) or withheld judgments(s)" still remains consistent and controlling as he believed that whatever the form of the "judgment" was, it had to be in that form, of record, and not affected by a subsequent court order that may have dismissed the action under the effects of *I.C.* §19-2604 , and not have a plea of guilt record at the time of the subsequent DUI charge. If it be the correct analysis of legislative interpretation that it is presumed the legislature knew guilty pleas could be

withdrawn, could be vacated, or could be set aside, and charges could be dismissed under the Expungement Statute §19-2604(1), *Idaho Code,* then their election to keep the requirements that two pleas or convictions had to be found in the record of the defendant, as a condition before enhancement could be implemented. It appears the legislature was not opposed to subsequent relief following entry of suspended judgments or withheld judgments, knowing the definition Chief Justice Walters had given to the phrase of "notwithstanding the form of the judgment(s) or withheld judgments(s)" of record at the time of a subsequent charge, and well knowing the power of the court to eliminate pleas, when applying the operative purpose of *I.C.* §19-2604, as it relates to a plea or finding of guilt.

We again want to emphasize our belief that it was *Robinson* which afforded the court to finally address what Justice Walters concluded in 1991; that it was unnecessary language in a dismissal order, to specifically address the plea itself, as the dismissal itself eliminated the guilty plea, whether it be the intent of the court to withdraw it, vacate it or set it aside in its desire to extend relief as provided by *I.C.* §19-2604. Under *Robinson*, by the implications of *I.C.*§19-2604, you do not have to say <u>how</u> the guilty plea is eliminated, you just need to order a dismissal, and it then becomes eliminated from the judgment or withheld judgment which may have before been granted, by virtue of the dismissal. Upon that event, the expungement is complete, and the legislature knew that relief was statutorily available.

We also believe *Robinson* may have chosen to emphasize to the legislature, the fact that guilty pleas could be withdrawn and charges could be dismissed, and expungement could result from the effect of such court orders, and if the legislature should want to <u>avoid</u> the expungement effects of court orders in such cases, it would need to amend the

requirements of the enhancement penalty statute, to say notwithstanding any dismissal orders that may follow any form of judgment(s) or withheld judgment (s). This court must interpret the Penalty Enhancement Statute as it is written, and give enforcement to what it requires as being the elements of its application. That Statute states:

> Except as provided in section 18-8004C, Idaho Code, any person who pleads guilty to or is found guilty of a violation of the provisions of section 18-8004(1)(a), (b) or (c), Idaho Code, who previously has been found guilty of or has pled guilty to two (2) or more violations of the provisions of section 18-8004(1)(a), (b) or (c), Idaho Code, or any substantially conforming foreign criminal violation, or any combination thereof, within ten (10) years, notwithstanding the form of the judgment(s) or withheld judgment(s), shall be guilty of a felony.
>
> (underlining emphasis ours)

The legislature did not go on to state and "notwithstanding the content of any subsequent dismissal orders and notwithstanding the intended effects of *I.C.* §19-2604". The final order of a court may lawfully eliminate the existence of a judgment or withheld judgment that may before exist in a case. Once the judgment or withheld judgment has become superseded by a subsequent order, and the entry of a dismissal, that affects what before may have been the plea or conviction of record, as it becomes transformed into a nullity and is entitled to the entire beneficial effects of the expungement statute, which is absolutely consistent with the intent of the court's final order in our case. We had emphatically demonstrated the intent to nullify the plea, just as it was demonstrated by the withdrawal in *Manners*, and as it was then believed to be emphasized in the *Deitz* decision requiring some form of additional language to cause application of the expungement statute. Whether or not we needed to reinstate the "not guilty" plea, we did so to demonstrate the only plea of record was to be the former "not guilty" plea; and whether or not we needed to have the court declare the guilty plea never tendered to or accepted by the court, we did that

as well, and did it to emphasize the guilty plea never existed and it was never tendered, and it was never accepted.

By virtue of this final order, this event that occurred on May 6, 2004, was completely "erased" and made a nullity, and could never be used as a basis to find a "determination of guilt" after May 16, 2006, as it disappeared unconditionally May 16, 2006, by the court's authority and exercise of that authority and its jurisdiction under the expungement statute.

The Penalty Enhancement Statute is subject to the expungement consequences that could occur by a subsequent court order when a court elects to reinstate a not guilty plea, or eliminates tenders of pleas and revokes acceptance of guilty pleas, and enters orders that 'erase", "nullify" or "eliminate" what might have been regarded as a determination of guilt under a judgment or a withheld judgment as may before be entered by the court, but once the final order is entered that does accomplish what this order was designed to order, the dismissal made the plea become "non-existent" and expunged it from any record for all purposes.

CONCLUSION

Since there could be no determination of guilt anywhere found of record in Valley County, Idaho, due to the consequential effects of Judge Henry R. Boomer's final order of May 16, 2006, as a result of this withdrawn guilty plea, reinstatement of the not guilty plea, the court declaring there has never been a guilty plea tendered to or accepted by the court, and the case dismissed entirely with prejudice, as a matter of Idaho law, the former plea taken that resulted in the withheld judgment, became a "nullity", and became a completely non-existent, and Mr. Reed, as a matter of law, became exempt from the enhancement

penalty provisions of §19-2604, *Idaho Code*, as there is no legislative mandate declaring some other exclusive statutory means to elimination application of §18-8005, *Idaho Code*, as was the statutory scheme with the Registry Act of §18-8304, *Idaho Code*, where a defendant must meet the requirements for release and expungement as set out by our legislature in §18-8310, *Idaho Code*.

Dated this 10th day of August 2010.

Vernon K. Smith
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 10th day of August 2010, I caused a true and correct copy of the above and foregoing to be delivered to the following persons at the following addresses as follows:

Idaho Supreme Court	( )	U.S. Mail
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