7-12-2013

State v. Longee Appellant's Brief Dckt. 40435

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. NICHOLAS JAMES LONGEE, Defendant-Appellant.	NO. 40435 TWIN FALLS COUNTY NO. CR 2012-4950 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

Nature of the Case

Nicholas James Longee appeals from the judgment of conviction for grand theft by possession of stolen property, unlawful possession of a firearm, solicitation of grand theft by disposing of stolen property, and being a persistent violator following a jury trial at which he represented himself. On appeal, he asserts that the district court committed fundamental error in violation of his Fifth, Sixth, and Fourteenth Amendment right to testify, when it instructed the jury that he was not a witness and that nothing he said was evidence. He further asserts that the evidence was insufficient to establish that he was a persistent violator because the two prior convictions upon which the State relied did not constitute two separate convictions under *State v. Brandt*, 110 Idaho 341 (Ct. App. 1986).

Statement of the Facts and Course of Proceedings

Nicholas Longee was charged by Information with grand theft by possession of stolen property, unlawful possession of a firearm, solicitation of grand theft by disposing of stolen property, and being a persistent violator. (R., pp.49-52.) Mr. Longee proceeded to trial representing himself. (*See generally* Trial Tr.) At trial, the State presented testimony from witnesses to establish that, *inter alia*, five guns had been stolen from the residence of William Tharp during a burglary.[1] (Trial Tr., p.116, L.6 – p.131, L.23, p.136, L.11 – p.155, L.12.)

[1] The magistrate declined to bind Mr. Longee over on the burglary charge, having found the evidence to be insufficient to establish his involvement. (Preliminary Hearing Tr., p.76, L.12 – p.80, L.6.)

In order to establish that Mr. Longee was in possession of the guns, which were not recovered from Mr. Longee, the State presented three witnesses. (*See generally* Trial Tr.) The first, Kenneth Worth, a twice-convicted burglar then in custody on new felony charges, testified that Mr. Longee, a person he knew from the rider program and his neighbor in a halfway house,[2] had attempted to get him to recover and sell guns that had come from "some house out in the country." (Trial Tr., p.186, L.6 – p.190, L.12.) Mr. Worth testified that he had no desire to get involved, but did agree to give Mr. Longee a ride to the home of Omar Padilla. (Trial Tr., p.190, L.24 – p.192, L.23.) Mr. Worth knew Mr. Padilla from having spent one week in the same cell block with him in 2010. (Trial Tr., p.193, L.24 – p.194, L.10.) Mr. Worth eventually acknowledged that he was told by the prosecutor that he would receive "consideration" for his testimony against Mr. Longee. (Trial Tr., p.213, L.16 – p.214, L.1.)

The State then called Omar Padilla, a convicted felon in custody on a new felony charge (Trial Tr., p.245, Ls.2-4), who testified that he originally met Mr. Longee while they were in jail together the preceding year, and had received a call from Mr. Longee saying that he urgently needed to meet with him. (Trial Tr., p.215, L.19 – p.219, L.9.) Mr. Padilla agreed to meet with Mr. Longee at the home of his girlfriend, Ashtyn Jones, and after Mr. Longee arrived, he asked Mr. Padilla if he could give him a ride to a friend's house "to pick up some thumpers." (Trial Tr., p.220, L.16 – p.221, L.10.) Mr. Padilla agreed, believing that "thumpers" was slang for speakers. (Trial Tr., p.221, L.11 – p.223, L.4.) Ultimately, with Ms. Jones driving, they ended up stopping on a rural

[2] Upon being allowed to proceed *pro se*, Mr. Longee withdrew a Motion in Limine filed by his attorney which sought to exclude mention of his probation status, the nature of his prior felony convictions, and his residing in a halfway house at the time of the alleged incident in this case, reasoning that he "had nothing to hide." (Tr., p.17, L.2 – p.19, L.7.)

road, at which point Mr. Padilla and Mr. Longee exited the car. Mr. Longee then went to a "little ditch or canal" from which he returned with a pillowcase which he put into the trunk, after which they drove back to town. (Trial Tr., p.223, L.4 – p.229, L.12.)

When they arrived in town, Mr. Padilla and Mr. Longee got out of the car because Mr. Longee wanted to show Mr. Padilla the "thumpers." (Trial Tr., p.230, Ls.1-6.) Mr. Padilla then discovered that the "thumpers" were actually five handguns, which Mr. Longee asked him to sell for him for no less than $80 apiece, with Mr. Padilla's payment being that he could keep one of the guns. (Trial Tr., p.230, L.12 – p.232, L.10.) While Mr. Padilla was "scared" because he was a convicted felon and believed the guns to be stolen, he "play[ed] along" and agreed to Mr. Longee's proposal. (Trial Tr., p.232, L.11 – p.234, L.22.) After driving away, Ms. Jones "was crying," which Mr. Padilla believed was because she had overheard his discussion with Mr. Longee about the guns. (Trial Tr., p.234, L.25 – p.235, L.7.) At that point, they talked, and weighed their options, which included putting the guns back in the ditch or throwing them in the garbage or off of a bridge before deciding to consult with an off-duty police officer that they knew. (Trial Tr., p.235, Ls.7-25, p.240, L.16 – p.241, L.16.) Before talking to the police officer, Mr. Padilla put the guns in the backyard of a house. (Trial Tr., p.236, Ls.1-7.) After talking to the police officer, they took two on-duty officers to the house where the guns were recovered. (Trial Tr., p.236, L.8 – p.238, L.6.) When Mr. Longee later called Mr. Padilla to inquire as to the money for the guns, Mr. Padilla told him that he had "turned the guns in," which upset Mr. Longee who then gave Mr. Padilla one week to come up with the money for the guns (Trial Tr., p.238, L.7 – p.239, L.12.)

Ms. Jones testified that she gave Mr. Longee a ride to the country where he picked up a something that looked like a "bag or a pillow case," which he put in the trunk. (Trial Tr., p.273, L.6 – p.281, L.22.) When they got back to town, Mr. Padilla and Mr. Longee went to the trunk and were "looking through the stuff, whatever it was" when she heard Mr. Longee say "[.]45 and .22," which she believed were references to guns. (Trial Tr., p.281, L.20 – p.283, L.11.) After they dropped Mr. Longee off at his home, she began "freaking out" before she and Mr. Padilla decided what to do about the situation, eventually deciding to turn the guns in to the police. (Trial Tr., p.284, L4 – p.286, L.2.)

According to the police, the manner in which the police who recovered the guns from Mr. Padilla's possession handled them "eliminated any chances of being able to get the fingerprints from those firearms." (Trial Tr., p.317, L.13 – p.318, L.5.) An attempt to lift fingerprints from the guns approximately one month after they were seized was unsuccessful. (Trial Tr., p.325, L.7 – p.326, L.9.)

After calling a witness, Samuel Ferrell, who didn't testify to anything of significance, Mr. Longee testified on his own behalf concerning the events at issue. (Trial Tr., p.362, L.15 – p.379, L.25.) Mr. Longee testified that he had saved up enough money to buy his first car, and had enough extra that he could buy a stereo system. He asked Mr. Worth whether he knew anyone who could get him "a good deal" on a stereo system, and, after making a few phone calls, Mr. Worth told him that Mr. Padilla could be of help. Remembering Mr. Padilla from his time in the rider program, Mr. Longee agreed to meet with Mr. Padilla, who told him that he would need to pick the speakers up but didn't want his girlfriend, Ms. Jones, knowing about it. As such, he told Mr. Longee to pretend that the items being picked up were Mr. Longee's. Ms. Jones

then agreed to give Mr. Longee a ride to pick up what she thought were his items. (Trial Tr., p.379, L.6 – p.381, L.18.)

Mr. Longee testified that he was somewhat familiar with the area where Mr. Padilla had told him the speakers were, but that he relied on hand signals from Mr. Padilla to know exactly where to tell Ms. Jones to turn and stop. (Trial Tr., p.381, L.21 – p.382, L.11.) When they got to the location, Mr. Padilla showed him where a pillowcase was in the ditch. (Trial Tr., p.382, Ls.12-17.) The pillowcase contained boxes, which he later learned contained guns, but which Mr. Longee believed were "some sort of speaker." (Trial Tr., p.382, L.22 – p.383, L.2.) Mr. Longee retrieved the pillowcase as instructed, and placed it in the trunk of Ms. Jones' car, at which point they headed back to town. (Trial Tr., p.383, Ls.3-6.) Upon arriving back in town, Mr. Padilla showed Mr. Longee that the pillowcase contained guns, at which point Mr. Longee said, "Oh, crap. That's a .22. That's a .45," causing Mr. Padilla to "shush[]" him while pointing to Ms. Jones, who was still in the car. (Trial Tr., p.383, L.17 – p.384, L.8.) Mr. Padilla then unsuccessfully sought to have Mr. Longee hold onto the guns for him. (Trial Tr., p.384, Ls.9-21.) Mr. Padilla then had Ms. Jones give Mr. Longee a ride home, after which he had no further contact with Mr. Padilla. (Trial Tr., p.384, L.22 – p.385, L.4.) Mr. Longee did not call the police on Mr. Padilla because he didn't want to become a "snitch." (Trial Tr., p.403, L.21 – p.404, L.5.)

While instructing the jury as to the law it must follow in reaching a verdict, the district court orally instructed the jury as follows:

> *Certain things you have heard or seen are not evidence, including*:
>
> One, arguments and *statements by* lawyers, *or in this case, Mr. Longee.* The lawyers and *Mr. Longee are not witnesses. What they say* in their opening statements, closing arguments, and *at other times is intended to help you interpret the evidence but is not evidence.* If the facts as you

> remember them differ from the way the lawyers or Mr. Longee have stated them, follow your memory . . . .

(Trial Tr., p.469, L.21 – p.470, L.6 (emphases added).)

At trial on the persistent violator allegation, the State presented no evidence, resting on the two judgments of conviction that were introduced at trial on the criminal charges. (Trial Tr., p.522, L.14 – p.523, L.6.) Ultimately, relying only on the judgments of conviction, the jury found Mr. Longee to be a persistent violator. (Trial Tr., p.529, Ls.1-25.)

Prior to announcing its sentencing decision, the district court explained that "the effect of the persistent violator conviction is that this court needs to make a statement to both a defendant and as well as the public at large that if you have become convicted of being a persistent violator that that has to have some type of consequence, more than just a charge on a piece of paper." (Tr., p.87, Ls.10-16.) Ultimately, the district court imposed a unified sentence of twenty years, with five years fixed, for grand theft by possession of stolen property, and concurrent sentences of five years fixed on the remaining two charges. (Tr., p.91, Ls.10-18.)

Mr. Longee filed a timely Notice of Appeal. (R., p.306.)

ISSUES

1. Did the district court commit fundamental error, in violation of Mr. Longee's Fifth, Sixth, And Fourteenth Amendment right to testify at trial, when it instructed the jury that he was not a witness and that nothing he said was evidence?

2. Must the persistent violator finding be vacated because it was not supported by sufficient evidence?

ARGUMENT

I.

The District Court Committed Fundamental Error, In Violation Of Mr. Longee's Fifth, Sixth, And Fourteenth Amendment Right To Testify At Trial, When It Instructed The Jury That He Was Not A Witness And That Nothing He Said Was Evidence

A. Introduction

Mr. Longee asserts that the district court committed fundamental error, in violation of his Fifth, Sixth, and Fourteenth Amendment right to testify, when it instructed the jury that he was not a witness and that nothing he said was evidence. Because the error was constitutional, plain, and was not harmless, his convictions must be vacated, with this matter remanded for a new trial.

B. Standard Of Review

In *State v. Perry*, 150 Idaho 209 (2010), the Idaho Supreme Court announced a new standard of review to be applied to unobjected to error, which it set forth as follows:

> If the alleged error was not followed by a contemporaneous objection, it shall only be reviewed by an appellate court under Idaho's fundamental error doctrine. Such review includes a three-prong inquiry wherein the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists; and (3) was not harmless. If the defendant persuades the appellate court that the complained of error satisfies this three-prong inquiry, then the appellate court shall vacate and remand.

Perry, 150 Idaho at 228.

The Idaho Court of Appeals has concluded that unobjected to instructional errors are to be analyzed under the three-prong test set forth in *Perry*. *State v. Sutton*, 151 Idaho 161, 165-66 (Ct. App. 2011).

C. The District Court Committed Fundamental Error, In Violation Of Mr. Longee's Fifth, Sixth, and Fourteenth Amendment Right To Testify At Trial, When It Instructed The Jury That He Was Not A Witness And That Nothing He Said Was Evidence

Following Mr. Longee's testimony and prior to the jury's deliberations, the district court orally instructed the jury as follows:

> *Certain things you have heard or seen are not evidence, including*:
>
> One, arguments and *statements by* lawyers, *or in this case, Mr. Longee*. The lawyers and *Mr. Longee are not witnesses*. *What they say* in their opening statements, closing arguments, and *at other times is intended to help you interpret the evidence but is not evidence.* If the facts as you remember them differ from the way the lawyers or Mr. Longee have stated them, follow your memory . . . .

(Trial Tr., p.469, L.21 – p.470, L.6 (emphases added).) This instruction was immediately preceded by an instruction in which the district court explained, "You are to decide the facts from all the evidence presented in the case. The evidence you are to consider consists of: one, sworn testimony of witnesses . . . ." (Trial Tr., p.469, Ls.13-16.) The instruction was immediately followed by an instruction on factors to consider in deciding whether to believe the testimony of a witness. (Trial Tr., p.470, L.11 – p.471, L.5.)

Prior to the recognition of the constitutional right to testify, criminal defendants were almost uniformly deprived of the ability to testify under oath at their own trials on the grounds that they were incompetent to do so because they had an interest in the proceedings. *See Ferguson v. Georgia*, 365 U.S. 570, 572-86 (1961) (providing historical background of the prohibition and steps taken to ameliorate the harsh effects of the rule). "Under the common law, the practice did develop of permitting criminal defendants to tell their side of the story, but they were limited to making an unsworn statement that could not be elicited through direct examination by counsel and was not

subject to cross-examination." *Rock v. Arkansas*, 483 U.S. 44, 49 (1987). In *Ferguson*, the Court recognized the limitations of such unsworn statements, explaining that they were not evidence and that jurors frequently receive commentary from the courts highlighting the fact that such statements are not made under oath, are not subject to cross-examination, are not evidence, that making a false statement does not subject the defendant to any liability for perjury, and that the jurors may give it whatever value they wish. *Ferguson*, 365 U.S. at 587-89.

A criminal defendant has a constitutional right, under the Fifth, Sixth, and Fourteenth Amendments to the Constitution, to testify at trial. *Rock*, 483 U.S. at 51-53. In recognizing this right, the Supreme Court has explained that it is "one of the rights that 'are essential to due process of law in a fair adversary process.' The necessary ingredients of the Fourteenth Amendment's guarantee that no one shall be deprived of liberty without due process of law include a right to be heard and to offer testimony . . . ." *Id.* at 51 (citation omitted). Explaining its importance, the Court concluded that "the most important witness for the defense in many criminal cases is the defendant himself." *Id.* at 52. A constitutional right can be violated through an erroneous jury instruction. *See Sullivan v. Louisiana*, 508 U.S. 275 (1973) (defective reasonable doubt instruction violating Sixth Amendment right to a jury trial); *see also Cupp v. Naughten*, 414 U.S. 141, 146 (1973) (holding that, in federal habeas proceedings challenging state court conviction, an erroneous instruction can only result in reversal if "it violated some right which was guaranteed to the defendant by the Fourteenth Amendment").

In *Wilson v. Mitchell*, 498 F.3d 491 (6th Cir. 2007), the Sixth Circuit considered whether a penalty phase instruction in a *pro se* defendant's capital murder trial violated

the defendant's due process right to have the jury consider all mitigating evidence in deciding whether to sentence him to death.[3] That instruction read as follows:

> In this phase, the Defendant made a statement, but he did not testify under oath and was not subject to cross-examination. It is his right under Ohio law to make such a statement and this statement of the Defendant, *although not considered evidence*, may be considered by you for whatever purpose you would assign.

Wilson, 498 F.3d at 514 (emphasis in original). In concluding that it did not violate his due process rights, the Sixth Circuit noted that, while the trial court had told the jury the statement was not evidence, "the court also instructed that the jury may consider it for whatever purpose it would assign" meaning that "there is no reasonable likelihood that the instructions prevented the jury's consideration of the statement." Additionally, even assuming it did, "the jury considered similar mitigating evidence from other witnesses at sentencing, so the instructions regarding his statement could not have so infected the entire trial as to violate due process." *Id.*

Unlike the instruction recognized as appropriate in *Wilson*, the instruction given in Mr. Longee's case prohibited the jury from considering Mr. Longee's testimony for any purpose other than "to help interpret the evidence," while also informing the jury that, as a matter of law, he was not a witness and that nothing he said was evidence. While the right at issue in this case (the Fifth, Sixth, and Fourteenth Amendment right to testify) differs from the right considered in the *Wilson* opinion (the Fourteenth Amendment due

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[3] The due process right identified by the court derives from the United States Supreme Court's decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), in which it held:

> [T]hat the Eighth and Fourteenth Amendments require that the sentence, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

process right to present all mitigating evidence during the penalty phase of a capital case), the logic and analysis are appropriate to apply to Mr. Longee's case. Unlike the situation in *Wilson*, the jury in Mr. Longee's case was not only told that it *could not* consider any of his statements for evidentiary purposes but that it could *only* use them "to help interpret the evidence," the same consideration that was to be given to statements made by the prosecutor. Additionally, there were no other witnesses who provided the information that Mr. Longee provided through his testimony, which, if believed, exculpated him from any liability for the crimes charged. In light of the significant differences between the permissible instruction in *Wilson* and the instruction given in Mr. Longee's case, he asserts that his due process rights and his right to testify were violated by the instruction.

In considering the effect of jury instructions, the Idaho Supreme Court has stated, "We must presume that the jury followed the jury instructions in arriving at their verdict." *Weinstein v. Prudential Property and Cas. Ins. Co.*, 149 Idaho 299, 335 (2010) (citation omitted). In light of this presumption and the nature of the evidence presented in the State's case, in which the only witnesses that established Mr. Longee's guilt were two convicted felons and a girlfriend of one of the felons, the instructional error, through which the jury was forbidden to consider Mr. Longee's exculpatory testimony as evidence, was not harmless beyond a reasonable doubt.[4] As such, this Court should

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Lockett, 438 U.S. at 604 (footnotes omitted) (emphasis in original).

[4] Mr. Longee does not assert, nor does he believe, that the district court intended to instruct the jury to disregard his testimony. However, the instruction, as read, had the effect of doing so, regardless of the district court's intent (which is irrelevant to the issue of whether the instruction violated Mr. Longee's rights). *See State v. Parsons*, 153 Idaho 666 (Ct. App. 2012) (the Court of Appeals expressing no doubt that an erroneous oral instruction, which effectively directed a verdict on an element, was not intended to have such an effect).

vacate the judgment of conviction, and remand this matter for a new trial at which Mr. Longee's constitutional right to testify will be honored.[5]

II.

The Persistent Violator Finding Must Be Vacated Because It Was Not Supported By Sufficient Evidence

At trial, the only evidence that the State presented to support the persistent violator enhancement were certified copies of two convictions for burglary, for which sentence was imposed on the same day following guilty pleas that had been entered on the same day. While the two judgments of conviction bore different case numbers, there is no indication that the burglaries were committed on different dates, involved different victims, or were not part of a common scheme or plan. In light of the Idaho Court of Appeals' decision in *State v. Brandt*, 110 Idaho 341 (Ct. App. 1986), the evidence presented by the State was insufficient to support the jury's finding of two separate felony convictions for purposes of the persistent violator enhancement. As such, the persistent violator finding must be vacated, with this matter remanded for resentencing without the persistent violator enhancement.

Idaho's persistent violator statute provides:

> Any person convicted for the third time of the commission of a felony, whether the previous convictions were had within the state of Idaho or were had outside the state of Idaho, shall be considered a persistent violator of the law, and on such third conviction shall be sentenced to a term in the custody of the state board of correction which term shall be for not less than five (5) years and said term may extend to life.

I.C. § 19-2514.

[5] For the reasons set forth in part II, *infra*, the persistent violator enhancement should not be a part of Mr. Longee's new trial, as the State failed to support it with sufficient evidence.

In considering Idaho's persistent violator statute, the Idaho Court of Appeals has noted, "The majority of jurisdictions do not permit multiple convictions entered the same day *or* charged in the same information to be used to establish a defendant's status as a habitual offender" based on the logic that "a defendant should be entitled to an opportunity to reform himself between convictions or that the persistent violator statute seeks to warn first time offenders." *Brandt*, 110 Idaho at 344 (emphasis added) (citations omitted). In its first chance to interpret Idaho's persistent violator statute, the Court of Appeals adopted this majority rule, explaining, "Generally, we agree with the majority that convictions entered the same day *or* charged in the same information should count as a single conviction for purposes of establishing habitual offender status." *Id.* (emphasis added). It did incorporate an exception to the general rule, explaining, "[T]he nature of the convictions in any given situation must be examined to make certain that the general rule is appropriate." *Id.*

Applying both the general rule and the exception to the facts of Brandt's case, the court explained that his prior convictions fell under the exception for the following reasons:

> The three offenses here were charged in three separate informations and each charge represented a separate crime occurring in a separate location with a separate victim. One of the crimes took place in February, 1984, and the other two crimes in January, 1984. The judgments and sentences were imposed the same day because of a plea bargain agreement that resulted in some charges being dismissed. One of the charges dropped happened to be a persistent violator charge. Since he had negotiated a dismissal of the first persistent violator charge, Brandt could hardly argue that he was not aware of the nature of such a charge or that he had not been warned of the consequences of repetitive criminal conduct. The purpose of our persistent violator statute is to punish repeat offenders by making their sentences for successive crimes more harsh.

Id. at 344 (citation omitted).

The general rule set forth in *Brandt* has since been applied several times by the Idaho Court of Appeals. In *State v. Harrington*, 133 Idaho 563 (Ct. App. 1999), the Court of Appeals upheld the district court's conclusion that two prior felony convictions from Arkansas fell within the scope of *Brandt*'s general rule, thus precluding imposition of a persistent violator enhancement. The court described the facts underlying those prior convictions as follows:

> Harrington was apprehended while attempting to burglarize a local Piggly Wiggly. Harrington admitted during his interrogation that he had burglarized that very same grocery store ten days prior. The State of Arkansas filed separate indictments on the two charges, but they had consecutive case numbers. Harrington pled guilty to both charges on December 9, 1993, in one proceeding before the same judge. Sentences for both convictions were entered on the same day and were identical.

Harrington, 133 Idaho at 565. In concluding that the district court correctly applied *Brandt*'s general rule, the Court of Appeals explained,

> Admittedly, the charges have separate case numbers and separate informations, although filed simultaneously, but we cannot allow the state of Idaho to circumvent the general rule of *Brandt* simply because an Arkansas prosecutor declined to consolidate these cases. Harrington's convictions were basically separate parts of a common scheme or plan and obviously could have been charged in one information, thus placing him squarely within the general rule articulated in *Brandt*.

Id. at 566.

In two other cases, the facts of which are easily distinguishable from those of Mr. Longee's case, the Court of Appeals has found that the exception recognized in *Brandt* applied. In one, the Court of Appeals noted that, although the two convictions were entered on the same day before the same judge, the "two prior felony convictions were unrelated crimes, grand theft and felony DUI, committed on different dates in different counties." *State v. Mace*, 133 Idaho 903, 907 (Ct. App. 2000). Furthermore, Mace did not even argue that the general rule in *Brandt* applied, having

"acknowledge[d] that because his prior felonies were unrelated crimes charged in separate informations, they do not qualify for treatment as a single conviction under the rule enunciated in *Brandt*." *Id.* Instead, Mace argued for the exception to *Brandt*'s general rule to be overruled, which the Court of Appeals declined to do. *Id.* In the second, the Court of Appeals found that the exception to the general rule applied because the "convictions were for separate crimes perpetrated on separate victims. They consisted of two burglaries in different counties, and one escape from a jail. These convictions were for distinguishable incidents of criminal conduct. Consequently, it was permissible to treat them as evidence of multiple prior felonies." *State v. Smith*, 116 Idaho 553, 560 (Ct. App. 1989).

The only similarity between Mr. Longee's prior convictions and those that the court used in applying the exception in *Brandt* is that they were almost certainly charged in separate charging instruments, which can be inferred from the fact that two separate judgments were prepared, each containing a different case number. (State's Exhibit Nos. 41 and 42.) That, however, is where the similarities end. In contrast to the facts presented by the State in *Brandt*, there is no indication that Mr. Longee's prior convictions involved separate victims, separate incidents, separate locations, or different dates. (State's Exhibit Nos. 41 and 42.) Nor is there any indication that Mr. Longee was warned, at the time of his guilty pleas in those matters, that he would be subject to the strictures of Idaho's persistent violator statute. (State's Exhibit Nos. 41 and 42.) Additionally, the facts presented by the State are similar to those in *Harrington* in which the general rule was applied to bar application of the persistent violator enhancement. Specifically, Mr. Longee's two convictions were for the same charge

(burglary), and resulted in concurrent, unified sentences of eight years,[6] with jurisdiction retained in each case. (State's Exhibit Nos. 41 and 42.)

Perhaps the State could have established facts similar to those presented in *Brandt*, *Smith*, and *Mace* in order to invoke the exception had it chosen to present charging instruments for the two cases, documents regarding a plea agreement, and/or transcripts from the plea hearings. Having chosen not to do so, the State failed to present sufficient evidence that Mr. Longee had two prior felony convictions that were separate and distinct for purposes of the persistent violator enhancement.

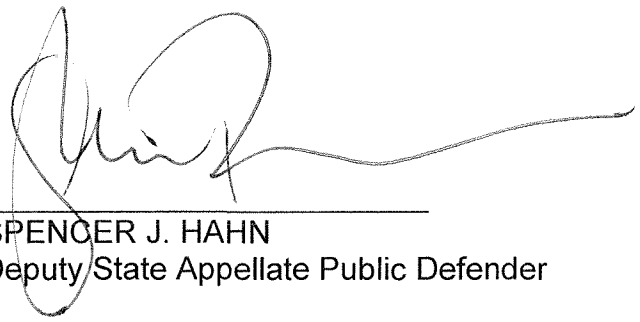
Because the State failed to present sufficient evidence that Mr. Longee's two prior convictions for burglary were separate and distinct convictions necessary to invoke the exception to the general rule adopted in *Brandt*, he respectfully requests that this Court vacate the persistent violator finding, and remand this matter for resentencing without applying the persistent violator enhancement.

[6] The only difference is that in one, Mr. Longee received a fixed term of two years, while in the other, he received a fixed term of three years.

CONCLUSION

For the reasons set forth herein, Mr. Longee respectfully requests that this Court vacate the judgment of conviction and remand this matter for a new trial. Additionally, he respectfully requests that this Court vacate the persistent violator finding, and, depending on this Court's ruling on the first issue, either remand the matter for resentencing without the enhancement or prohibit the State from seeking the enhancement at the retrial.

DATED this 12th day of July, 2013.



SPENCER J. HAHN
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of July, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

NICHOLAS JAMES LONGEE
INMATE #101205
ICIO
381 HOSPITAL DRIVE
OROFINO ID 83544

RANDY J STOKER
DISTRICT COURT JUDGE
E-MAILED BRIEF

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SJH/eas