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## State v. McCabe Appellant's Brief Dckt. 41357

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	NO. 41357
Plaintiff-Respondent,	)	
	)	JEROME COUNTY NO. CR 2013-317
v.	)	
	)	
MELVIN ARTHUR MCCABE,	)	APPELLANT'S BRIEF
	)	
Defendant-Appellant.	)	

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**BRIEF OF APPELLANT**

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

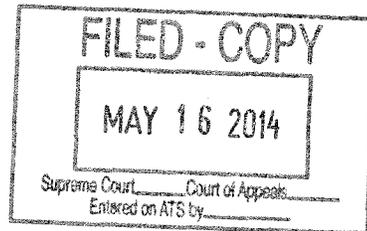
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## STATEMENT OF THE CASE

### Nature of the Case

Melvin Arthur McCabe appeals from the district court's judgment of conviction and order denying his motion to withdraw his guilty plea. Mr. McCabe asserts that the district court abused its discretion when it failed to *sua sponte* order a mental health evaluation and make a determination as to Mr. McCabe's competency to represent himself. Additionally, Mr. McCabe asserts that the district court abused its discretion when it denied his motion to withdraw his guilty plea.

### Statement of the Facts and Course of Proceedings

In January of 2013, Jerome Police Officer Summers arrested Mr. McCabe for driving without privileges. (Presentence Investigation Report (*hereinafter*, PSI) p.4.)<sup>1</sup> Subsequently, Officer Summers located a cigarette pack on Mr. McCabe that contained a white crystal substance that was later identified as methamphetamine. (PSI, p.4.) Inside Mr. McCabe's vehicle, Officer Summers also discovered a glass pipe with residue, two digital scales, and a plastic tube. (PSI, p.4.)

Mr. McCabe was originally charged with one count of possession of a controlled substance, felony, in violation of I.C. § 37-2732(a); one count of driving without privileges, misdemeanor, in violation of I.C. § 18-8001; one count of possession of drug paraphernalia, misdemeanor, in violation of I.C. § 37-2734A; and one count of failure to provide proof of insurance (second offense), misdemeanor, in violation of I.C. § 49-1232. (R., pp.67-69.) Additionally, the State sought a persistent violator enhancement,

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<sup>1</sup> All page cites to the PSI and its attachments refer to the 38-page electronic document entitled "41357 State v. McCabe Confidential Exhibits."

under I.C. §19-2514, based on the fact that Mr. McCabe had four prior felony convictions. (R., pp.70-71.) Later, the State also filed an Amended Information Part 2 charging an enhancement, under I.C. § 37-2739, based on a prior misdemeanor conviction for possession of drug paraphernalia. (See R., pp.404-405.) That enhancement allowed the district court to impose a sentence that was twice the standard maximum for a possession of a controlled substance conviction. (See I.C. § 37-2739; Tr. 5/13/13, p.12, Ls.5-10.)

Counsel was appointed for Mr. McCabe, but Mr. McCabe subsequently filed a notice of appearance under *Faretta v. California*, 422 U.S. 806 (1975), and requested that the district court allow him to represent himself. (R., pp.78-83.) After a hearing, the district court allowed Mr. McCabe to proceed *pro se*. (R., p.106.) Mr. McCabe then filed a suppression motion that was denied by the district court. (R., pp.267-280, 304-321.) Later, pursuant to a plea agreement, Mr. McCabe pleaded guilty to one count of possession of a controlled substance and to the enhancement, under I.C. § 37-2739. (Tr. 5/13/13, p.8, Ls.2-8, 21-23, p.11, Ls.19-25.) In exchange, the State agreed to dismiss the remaining counts, as well as the persistent violator enhancement, and recommend a unified sentence of fourteen years, with six years fixed. (Tr. 5/13/13, p.8, Ls.9-17.)

At sentencing, the district court followed the State's recommendation and imposed a unified sentence of fourteen years, with six years fixed. (R., pp.431-437; Tr. 7/12/13, p.18, Ls.13-15.) Mr. McCabe filed, *pro se*, a Notice of Appeal that was timely from the Judgment of Conviction. (R., pp.440-442.)

Mr. McCabe subsequently filed, *pro se*, a Motion to Withdraw Guilty Plea under I.C.R. 33(c) (*hereinafter*, Rule 33(c)). (R., pp.477-483; see also affidavit in support of

motion, R., pp.488-491.) To substantiate the claims in that Rule 33(c), he also filed a motion for a competency evaluation, and a motion for GPS readings and hair follicle analysis to offer evidence that he was in a state of methamphetamine induced incompetence during the proceedings against him (R., pp.492-494; GPS motion - augmented to the record on April 3, 2014.) In his motion for a competency evaluation, he said that he was under the influence of methamphetamine, which made him “unable to appreciate and understand the nature or consequences of waiving counsel or entering a plea of guilty to the crime charged.” (R., pp.492-494.)

In his Rule 33(c) motion and supporting affidavit, Mr. McCabe asserted, among other claims, that his use of methamphetamine “prevented him from having the mental state necessary to be held responsible for a crime related to his drug addiction and/or have the prerequisite competency to waive the constitutional right to counsel or to assist and prepare a defense to the extent that a waiver of counsel would/could be held constitutionally valid.”<sup>2</sup> (R., pp.489-490.) He went on to say that the district court recognized this diminished capacity, and therefore should have *sua sponte* ordered a competency hearing to “determine the extent of defendant’s mental disease or defect from toxic and lethal methamphetamine use or to determine if defendant was suffering from drug induced mental incompetence on a level that made him unable to understand the nature and/or consequences of a waiver of counsel or guilty plea.” (R., p.490.)

The district court denied Mr. McCabe’s motion to withdraw his guilty plea. (See Memorandum Decision Re: Defendant’s Motion to Withdraw Guilty Plea, I.C.R. 33(c) (*hereinafter*, Rule 33(c) Decision) – augmented to the record on April 3, 2014.) In

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<sup>2</sup> Mr. McCabe made several other claims as part of his Rule 33(c) motion that are not being challenged on appeal.

regards to Mr. McCabe's claim that he was under the influence of methamphetamine during the proceedings, the district court said that, based on the *Faretta* hearing, it was "satisfied that the defendant made a valid waiver of counsel and that the waiver was not the result of being under the influence of controlled substances of any kind or any claim of diminished capacity." (Rule 33(c) Decision, p.14.) Additionally, the district court said that, during the change of plea hearing, it asked if Mr. McCabe was under the influence of any drugs or alcohol, and Mr. McCabe said he was not. (Rule 33(c) Decision, p.14.) Therefore, the district court found that the record proved that Mr. McCabe was not under the influence of drugs during the proceedings, and thus his plea was known, intelligent, and voluntary. (Rule 33(c) Decision, p.15.)

The district court also denied Mr. McCabe's motion for GPS readings and hair follicle analysis. It explained that the GPS readings would not produce any evidence of drug use because the ankle monitor he wore only tracked his location, not the ingestion of drugs. (Rule 33(c) Decision, p.9.) In regards to the hair follicle analysis, it stated that it would be of no use to Mr. McCabe since hair follicle analysis does not indicate if the individual was using drugs at any particular time. (Rule 33(c) Decision, p.9.)

The district court denied Mr. McCabe's motion for a competency evaluation as well. (Rule 33(c) Decision, pp.7-8.) It stated that it was "at all relevant times familiar with defendant's substance abuse history, however, the court was also satisfied that his history of substance use did not impair his ability to understand the proceeding leading up to the entry of his Judgment of Conviction in this matter." (Rule 33(c) Decision, p.8.) It said that Mr. McCabe was incarcerated for approximately 45 days before his decision to represent himself, and it determined, as a result of the *Faretta* inquiry, that his decision was knowing, voluntary, and intelligent. (Rule 33(c) Decision, p.8.) It said that

"[a]t no time did the defendant's behavior, actions, conduct or writing's [sic] ever suggest to the court that he did not understand the proceedings against him." (Rule 33(c) Decision, p.8.) The district court also said that Mr. McCabe never raised the issue of his competency prior to his sentencing and "at no time did this court have any doubt as to the capacity of [sic] competency of the defendant to understand the nature and consequences of his plea." (Rule 33(c) Decision, p.8.)

## ISSUES

1. Did the district court abuse its discretion when it failed to *sua sponte* order a mental health evaluation and make a determination as to Mr. McCabe's competency to represent himself?
2. Did the district court abuse its discretion when it denied Mr. McCabe's Rule 33(c) motion to withdraw his guilty plea and his accompanying motion for a retroactive competency evaluation?

## ARGUMENT

### I.

#### The District Court Abused Its Discretion When It Failed to *Sua Sponte* Order A Mental Health Evaluation And Make A Determination As To Mr. McCabe's Competency To Represent Himself

##### A. Introduction

Mr. McCabe asserts that there was substantial evidence that he was incompetent when he waived his right to counsel. Therefore, he contends that relief should be granted because the district court's failure to order a mental health evaluation to determine his competency to represent himself violated his rights to due process, and his rights under I.C. §§ 18-210 and 18-211.

##### B. Standard of Review

When there is a clear abuse of discretion, the trial court's decision not to order a mental health evaluation will not be upheld on appeal. *State v. Hawkins*, 148 Idaho 774, 777 (2009). An appellate court reviews a district court's decision not to order a mental health evaluation for an abuse of discretion and examines "whether there was sufficient, competent, even if conflicting, evidence to support the district court's determination of competency." *Id.*

##### C. The District Court Abused Its Discretion When It Failed To *Sua Sponte* Order A Competency Hearing Because The District Court's Own Statements, And Those of Mr. McCabe, Demonstrated That Mr. McCabe Was Not Competent To Represent Himself

Mr. McCabe asserts that the district court abused its discretion when it failed to *sua sponte* order a mental health evaluation and make a determination as to Mr. McCabe's competency to represent himself, because there was sufficient evidence to raise a bona fide doubt as to his competency.

A criminal defendant may not be tried unless he is competent. *Pate v. Robinson*, 383 U.S. 375, 378 (1966). And “he may not waive his right to counsel or plead guilty unless he does so ‘competently and intelligently,’” *Godínez v. Moran*, 509 U.S. 389, 396 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938)). To guarantee such protection, Idaho Code § 18-210 states that “[n]o person who as a result of a mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, sentenced or punished for the commission of an offense so long as such incapacity endures.” Further, I.C. § 18-211 states that

[w]henver there is reason to doubt the defendant's fitness to proceed as set forth in section 18-210, Idaho Code, the court shall appoint at least one (1) qualified psychiatrist or licensed psychologist or shall request the director of the department of health and welfare to designate at least one (1) qualified psychiatrist or licensed psychologist to examine and report upon the mental condition of the defendant to assist counsel with defense or understand the proceedings.

Therefore, “a trial judge must conduct a competency hearing, regardless of whether one is requested, whenever the evidence before the judge raises a bona fide doubt about the defendant's competence to stand trial. A bona fide doubt exists if there is substantial evidence of incompetence.” *State v. Hawkins*, 148 Idaho 774, 778 (Ct. App. 2009) (citing *Williams v. Woodford*, 384 F.3d 567, 603–04 (9th Cir.2004)). However, because determinations of competency are inherently problematic, the *Hawkins* Court explained that “[a]n individual can have the capacity to understand the proceedings but lack a rational understanding, thereby resulting in incompetence.” *Id.* A rational understanding was in turn defined as having “a sufficient contact with reality.” *Id.*

The *Hawkins* decision was prior to the Idaho Supreme Court's clarification of fundamental error in *State v. Perry*, 150 Idaho 209 (2010). After *Perry*, this Court applies a three-part test to determine whether an error is fundamental: (1) whether the

alleged error violates an unwaived constitutional right; (2) whether the error is plain and obvious from the record, including information as to whether the failure to object was a tactical decision; and, (3) whether the defendant can establish that the error affected the outcome of the proceedings. *Id.* at 226. Here, the district court's failure to order a competency hearing *sua sponte* (or at least retroactively, as argued below) satisfies this test. First, Mr. McCabe never waived his right to due process at his *Faretta* hearing. Second, the error is clear from the record as described below. And finally, the error in this case affected the outcome of the proceedings because Mr. McCabe was left on his own to represent himself while he was incompetent. This was tantamount to a denial of counsel and ultimately led to Mr. McCabe to plead guilty.

In *Hawkins*, the Court acknowledged that the defendant was capable of preparing and arguing his own defense, largely without the help of standby counsel." *Id.* at 779. The Court also noted that the defendant was "alert and coherent" during the pretrial and trial process and "filed numerous pro se motions." *Id.* Indeed, Hawkins was even able to represent himself at trial with the help of standby counsel. *Id.* However, because of his strange behavior and "delusional characteristics during pretrial and trial," the Court said that the district court should have realized that Mr. Hawkins "might have been out of touch with reality and did not have a rational understanding of the proceedings." *Id.* Therefore, the Court held that the district court "should have entertained a reasonable doubt about Hawkins' mental competency either to stand trial or represent himself." *Id.* at 783. Thus, the Court found that the district court abused its discretion when it failed to *sua sponte* order a mental health evaluation and make a competency determination, so it vacated Mr. Hawkins's judgment of conviction and remanded the case. *Id.*

Here, Mr. McCabe's behavior leading up to and during his *Faretta* hearing, should have indicated to the Court that there was a reasonable doubt as to Mr. McCabe's ability to proceed *pro se*. Indeed, the district court even stated that it was concerned about Mr. McCabe's ability to communicate. Similar to the situation in *Hawkins*, the district court noted that Mr. McCabe could write motions well but said that it was concerned because, based on its prior experience with Mr. McCabe, "[m]any times" Mr. McCabe's "comments seem disjointed, confused, not full sentences . . . ." (Tr. 3/4/13, p.11, Ls.1-13.) Mr. McCabe actually demonstrated some of this behavior later in the *Faretta* hearing. When he was asked about whether his request to proceed *pro se* had anything to do with his public defender, Mr. McCabe said that he thought she did a good job even though there was a disagreement in the beginning, but then he exhibited an odd, almost frenetic thought pattern when he said

I just – Just like I said before I've lost confidence in her, but it's not to say she's a bad attorney, you know. But, you know, and it's no reflection on her, but – You know, I know we're on record and I'm not going to put myself in a position to – well, I'm not going to appeal – You know what, Your Honor, push come to shove, I will not appeal my ineffectiveness. I won't. You know, I'll shove it down my own throat as far as admitting that I'm satisfied with her, because there is a lot to be said about that.

(Tr. 3/4/13, p.14, Ls.8-20.)

Additionally, the district court was obviously concerned when it noted that shortly before his request to proceed *pro se*, Mr. McCabe made strong claims that he actually did need a lawyer. The district court said "I believe when we were here a week or two ago, your indication was that you really needed a lawyer because you're facing the potential of life? (Tr., 3/4/13, p.9, Ls.23-25 – p.10, L.1.) In response, Mr. McCabe said "Yes, I – Yeah, I did relay that to the court." (Tr. 3/4/13, p.10, Ls.2-3.) The court then asked why his decision had changed. (Tr. 3/4/13, p.10, L.4.) Mr. McCabe said "Well,

Your Honor, I just – I feel that I, you know, after reviewing the evidence and stuff like that, as long as everybody plays aboveboard I feel that this thing could be resolved before trial. I really do.” (Tr. 3/4/13, p.10, Ls.5-10.)

Mr. McCabe’s irrelevant and odd statements, his vacillations between coherent statements and confused ramblings, and his sudden shifts in strategy when facing such a long sentence should have indicated to the district court that Mr. McCabe did not have a sufficient contact with reality, and thus there was a reasonable doubt as to Mr. McCabe’s competence.

Nevertheless, the district court, in its memorandum decision on Mr. McCabe’s Rule 33(c) motion addressed Mr. McCabe’s claim that the court should have *sua sponte* ordered a competency evaluation and said it was “satisfied that the defendant made a valid waiver of counsel and that the waiver was not the result of being under the influence of controlled substances or any claim of diminished capacity.” (Rule 33(c) Decision, p.14.) Additionally, it said that while it “was at all relevant times familiar with the defendant’s substance abuse history” it was nonetheless “satisfied that his history of substance use did not impair his ability to understand the proceeding leading up to the entry of his Judgment of Conviction in this matter.” (Rule 33(c) Decision, p.8.) Also, it pointed out that Mr. McCabe was in the Jerome County Jail for “approximately 45 days” prior to his decision to represent himself. (Rule 33(c) Decision, p.8.)

The district court’s knowledge of Mr. McCabe’s severe, long-term methamphetamine abuse offered more evidence that he was potentially not competent to represent himself. And, unfortunately, an extended period of time in a county jail, is not definitive proof that the defendant has not used drugs during that period; it is common knowledge that drugs are often available to incarcerated defendants. (See

also The Washington Times, Drugs Inside Prison Walls, <http://www.washingtontimes.com/news/2010/jan/27/drugs-inside-prison-walls/?page=all>, (January 27, 2010).

Mr. McCabe asserts that his actions and statements provided substantial evidence of incompetence. Therefore, the district court should have recognized that there was a bona fide doubt about his competence and *sua sponte* ordered a competency hearing prior to allowing him to proceed *pro se*. Therefore, the district court abused its discretion.

## II.

### The District Court Abused Its Discretion When It Denied Mr. McCabe's Rule 33(c) Motion To Withdraw His Guilty Plea And His Accompanying Motion For a Retroactive Competency Evaluation

#### A. Introduction

Mr. McCabe asserts that his guilty plea was not knowing, intelligent, and voluntary because, due to his long-term use of methamphetamine, he was not competent when he pleaded guilty, and the district court's denial of his Rule 33(c) motion was premature because it failed to grant Mr. McCabe's motion for a retroactive competency determination.

#### B. Standard of Review

An appellate court reviews a district court's decision to deny a motion to withdraw a plea for an abuse of discretion. *State v. Hayes*, 138 Idaho 761, 765 (Ct. App. 2003).

C. Mr. McCabe's Guilty Plea Was Not Knowing, Intelligent, And Voluntary Because, Due To His Methamphetamine Abuse, He Was Not Competent When He Pleaded Guilty

"A motion to withdraw a plea of guilty may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw defendant's plea." I.C.R. 33(c). The Rule requires a higher standard of proof for post-sentence motions. See *State v. Flowers*, 150 Idaho 568, 571 (2011). "A showing of manifest injustice is necessary in order to withdraw a guilty plea after sentencing." *Id.*

"Because a guilty plea by a criminal defendant waives certain constitutional rights, including the privilege against self-incrimination, the right to a jury trial, and the right of confrontation, a guilty plea will only be upheld if the entire record demonstrates that the waiver was made voluntarily, knowingly, and intelligently." *State v. Heredia*, 144 Idaho 95, 97 (2007). "Manifest injustice occurs if this standard requiring a voluntary, knowing, and intelligent waiver is not met." *Id.*

A court determines whether a plea is entered voluntarily and knowingly through a three-part inquiry involving:

(1) whether the defendant's plea was voluntary in the sense that he understood the nature of the charges and was not coerced; (2) whether the defendant knowingly and intelligently waived his rights to a jury trial, to confront his accusers, and to refrain from incriminating himself; and (3) whether the defendant understood the consequences of pleading guilty.

*State v. Dopp*, 124 Idaho 481, 484 (1993). "On appeal, Idaho law requires that voluntariness of the guilty plea and waiver must be reasonably inferred from the record as a whole." *Id.*

Mr. McCabe contends that he has shown that the manifest injustice necessary to withdraw the plea existed because his plea was not knowing or voluntary. His plea was not knowing or voluntary because, as a result of his long-term methamphetamine use, he was not competent when he pleaded guilty, and thus he did not knowingly and intelligently waive his rights. Mr. McCabe asserts the district court prematurely denied his motion to withdraw his guilty plea because a retroactive competency evaluation would have proven that Mr. McCabe was not competent when he entered his plea. Mr. McCabe is indigent and had no means to pursue a retroactive competency evaluation.

Further, as argued above, there was sufficient evidence to show that he was not competent when he waived his right to counsel. Given that the district court failed to *sua sponte* order a competency hearing at that time, the district court should not have denied Mr. McCabe's motion for a retroactive competency hearing. Because the entire record does not support the fact that Mr. McCabe waived his rights voluntarily, knowingly, and intelligently, Mr. McCabe asserts that he has shown that manifest injustice occurred when the district court denied his motion for a retroactive competency evaluation and prematurely denied his motion to withdraw his guilty plea. Even if this Court cannot say that he was incompetent, there is at least a question which warranted a retroactive competency evaluation. Thus, Mr. McCabe asserts the district court abused its discretion.

CONCLUSION

For the above reasons, Mr. McCabe respectfully requests that this Court vacate his judgment of conviction and remand the case for a competency determination. Alternatively, he requests that this Court vacate the Rule33(c) order and remand the case for withdrawal of his guilty plea or, at a minimum, a competency determination.

DATED this 16<sup>th</sup> day of May, 2014.



REED P. ANDERSON  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 16<sup>th</sup> day of May, 2014, 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:

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