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State v. Ostler Appellant's Brief Dckt. 42335

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|-----------------------|---|-------------------------------|
| STATE OF IDAHO, |) | |
| |) | NO. 42335 |
| Plaintiff-Respondent, |) | |
| |) | BEAR LAKE CO. NO. CR 2013-416 |
| v. |) | |
| |) | |
| SCOTT LEWIS OSTLER, |) | APPELLANT'S BRIEF |
| |) | |
| Defendant-Appellant. |) | |

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BEAR LAKE

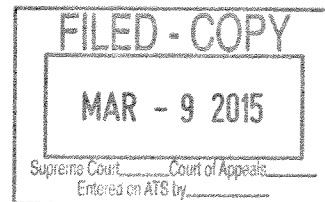
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STATEMENT OF THE CASE

Nature of the Case

Scott Ostler was charged with two counts of lewd conduct with a minor under 16, and one count of sexual abuse of a minor under 16, and a jury found him guilty of all three counts. Prior to sentencing, the district court granted Mr. Ostler a new trial on all three charges finding that it may have lacked subject-matter jurisdiction over the two lewd conduct charges. In response, the State filed a new Information adding a fourth charge (an additional lewd conduct charge), and a jury found Mr. Ostler guilty of all four counts. Mr. Ostler timely appeals and asserts that his right to due process of law was violated by the prosecutor adding a fourth charge after Mr. Ostler was granted a new trial.

Statement of the Facts and Course of Proceedings

The State filed a Criminal Complaint alleging that Scott Ostler had committed three crimes. (R., pp.26-27.) Count I alleged he committed lewd conduct with a minor under 16, M.C.; Count II alleged that he committed lewd conduct with a minor under 16, K.C.; and, Count III alleged that he committed sexual abuse of a minor under 16, K.C. (R., pp.26-27.) Mr. Ostler waived his right to a preliminary hearing and the State filed an Information, and later an Amended Information, charging Mr. Ostler with the above crimes. (R., pp.52-56, 107-108.) The case proceeded to trial and a jury found Mr. Ostler guilty of all three counts. (R., pp.275-290.)

Ten days after the verdict, the district court requested the parties provide briefing on the issue of whether the court had subject-matter jurisdiction in the case, as some of the evidence presented indicated that Mr. Ostler was under the age of 14 when the two acts of lewd conduct occurred. (Tr., pp.303-304.) Both parties provided the court with

briefing, a hearing was held on the matter and, in light of the Idaho Supreme Court's holding in *State v. Kavajecz*, 139 Idaho 482 (2003),¹ the district court vacated the convictions and ordered a new trial on all three counts. (R., pp.307-335; Tr., p.343, L.1 – p.379, L.7.)² The district court ordered the State to file a new Information to allege conduct occurring only after Mr. Ostler turned 14 years old, and the Court denied defense counsel's suggestion that a new preliminary hearing had to be held. (Tr., p.374, Ls.13-21; p.376, L.10 – p.378, L.24.)

The State filed a Fourth Amended Criminal Information, which alleged an additional charge – a second lewd conduct charge naming K.C. as the alleged victim – in addition to the three counts originally charged. (Tr., pp.342-343, 397-403.)³ Mr. Ostler did not object to the State adding a fourth charge and a jury found him guilty of all four counts. (R., pp.438-439, 442-448.) The court sentenced Mr. Ostler to concurrent unified terms of 10 years, with 3 years fixed, on each count, and retained jurisdiction. (R., pp.455-461.) Mr. Ostler filed a timely Notice of Appeal from the district court's Judgment of Conviction. (R., pp.455-461, 468-471.)

¹ After raising the question of subject-matter jurisdiction on its own initiative, the *Kavajecz* Court held,

Because it was not determined at trial if the acts for which Kavajecz was convicted occurred when he was thirteen or fourteen years old, and where the evidence appears to indicate that the majority of these acts occurred when Kavajecz was thirteen, we vacate all of Kavajecz's convictions and remand his case back to the district court for a new trial, including a determination of whether Kavajecz could be convicted of any crime depending on when these acts took place.

State v. Kavajecz, 139 Idaho 482, 484-485 (2003).

² All citations to the transcripts in this brief refer to the 676-page transcript containing the bulk of the proceedings, including both trials, the hearing on the court's subject-matter jurisdiction, and the sentencing hearing.

³ The State filed a Third Amended Criminal Information after the court ordered a new trial adding the fourth charge. (R., pp.342-343.) The Fourth Amended Criminal Information was later filed in order to remove unnecessary language appearing in one of the charges. (R., pp.397-403.)

ISSUE

Was Mr. Ostler's right to due process of law violated by the prosecutor charging him with an additional crime after the district court granted Mr. Ostler a new trial?

ARGUMENT

Mr. Ostler's Right To Due Process Of Law Was Violated By The Prosecutor Charging Him With An Additional Crime After The District Court Granted Mr. Ostler A New Trial

A. Introduction

The Due Process Clause of the Fourteenth Amendment prohibits prosecutors and courts from punishing people for exercising their legal rights. In the present case, the district court granted Mr. Ostler a new trial pursuant to I.C. § 19-2406(6) and I.C.R. 34. (Tr., p.377, L.10 – p.378, L.3.) Mr. Ostler's right to due process was violated when the prosecutor punished him for exercising his statutory right to pursue a new trial, by charging him with an additional felony.

B. The Prosecutor's Violation Of Mr. Ostler's Right To Due Process Of Law Is Fundamental Error And Is Not Harmless

Mr. Ostler did not object to the prosecutor adding a fourth charge against him after the district court granted him a new trial. However, he asserts that the prosecutor's actions constitute fundamental error and the error is not harmless.

Idaho appellate courts may consider alleged errors that were not preserved in the trial court under the doctrine of fundamental error. *State v. Perry*, 150 Idaho 209, 227-228 (2010). The *Perry* standard,

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 (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) 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.

Id. at 228. "[T]he *Perry* standard applies to all claims of error relating to proceedings in criminal cases in the trial courts." *State v. Carter*, 155 Idaho 170, 174 (2013).

1. Charging Mr. Ostler With An Additional Crime After He Was Granted A New Trial Violated His Right To Due Process

The Idaho Court of Appeals has observed, “[t]he Fourteenth Amendment’s Due Process Clause prohibits the government from punishing a person for doing what the law plainly allows him to do.” *State v. Rodriguez-Perez*, 129 Idaho 29, 32 (Ct. App. 1996) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978)). In *Blackledge v. Perry*, 417 U.S. 21 (1974), the defendant exercised his right under North Carolina law to seek a *de novo* trial after he was convicted of a misdemeanor and, in response, the prosecutor obtained a grand jury indictment charging him with a felony. *Id.* at 22-23. While finding that there was no evidence that the prosecutor acted maliciously or in bad faith, the Supreme Court nevertheless vacated the defendant’s conviction finding, “[d]ue process of law requires that such a potential for vindictiveness must not enter in to North Carolina’s two-tiered appellate process” and further found that “it was not constitutionally permissible” for the State to bring a more serious charge in response to the defendant’s invocation of his statutory right. *Id.* at 28-29.

In the present case, regardless of whether or not the prosecutor acted maliciously or in bad faith, Mr. Ostler’s right to due process was nevertheless violated when the prosecutor brought a fourth felony charge against him, after the district court granted him a new trial.

2. The Error Is Plain Exists

The State charged Mr. Ostler with three felonies. (R., pp.52-56, 107-108.) A jury found Mr. Ostler guilty of all three counts. (R., pp.275-290.) The district court vacated the convictions and ordered a new trial on all three counts. (R., pp.307-335; Tr., p.343, L.1 – p.379, L.7.) The State then filed a new Information alleging a fourth felony.

(Tr., pp.342-343, 397-403.) The facts demonstrate that, as a direct result of the district court vacating his three convictions and ordering a new trial, the prosecutor charged Mr. Ostler with a fourth felony. Thus, the error plainly exists on the face of the record.

Furthermore, there is simply no basis to conclude that Mr. Ostler's counsel's failure to object to the inclusion of a fourth charge was a tactical decision. After granting Mr. Ostler a new trial, the district court denied defense counsel's suggestion that a new preliminary hearing be held. (Tr., p.374, Ls.13-21; p.376, L.10 – p.378, L.24.) It is possible that defense counsel understood this decision as prohibiting him from objecting to the State's addition of a charge. In any event, there is simply no tactical advantage to be gained from allowing the defendant to face an extra charge of lewd conduct, when the defendant is already facing two other lewd conduct charges, in addition to a sexual abuse of a minor under 16 charge. Thus, there is simply no basis to conclude that defense counsel's failure to object was a tactical decision.⁴

3. The Error Is Not Harmless

Prior to the prosecutor adding a fourth charge in violation of Mr. Ostler's right to due process, Mr. Ostler was found guilty of three felonies. After the prosecutor's actions, the subsequent trial, and sentencing proceedings, Mr. Ostler has four felony convictions. Had the prosecutor not violated Mr. Ostler's right, there is, at the very

⁴ It seems likely that none of the members of the bar - the prosecutor, defense counsel, or the district court - recognized the constitutional implications of adding a new charge after the district court ordered a new trial. To assume otherwise would lead to the conclusion that the prosecutor knowingly violated Mr. Ostler's right to due process, defense counsel knowingly allowed the prosecutor to violate Mr. Ostler's right to due process without registering an objection, and the district court knew the prosecutor was violating Mr. Ostler's right to due process and knew defense counsel was violating Mr. Ostler's right to effective assistance of counsel, and did nothing to stop these constitutional violations.

least, a “reasonable possibility” that he would only have three felony convictions and, thus, the error is not harmless. See *Perry*, 150 Idaho at 226.

CONCLUSION

Mr. Ostler respectfully requests that this Court vacate his conviction for the lewd and lascivious conduct with a minor charge, alleged in Count III.

DATED this 9th day of March, 2015.


for JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9th day of March, 2015, 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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