6-24-2014

# State v. Southwick Respondent's Brief Dckt. 40855

IN THE SUPREME COURT OF THE STATE OF IDAHO



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| STATE OF IDAHO, | ) | |
| | ) | No. 40855 |
| Plaintiff-Respondent, | ) | |
| | ) | Twin Falls Co. Case No. |
| vs. | ) | CR-2001-9572 |
| | ) | |
| TAMI MARIE SOUTHWICK, | ) | |
| | ) | |
| Defendant-Appellant. | ) | |
| | ) | |

BRIEF OF RESPONDENT

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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## STATEMENT OF THE CASE

### Nature Of The Case

Tami Marie Southwick appeals from her conviction for possession of methamphetamine, entered upon a jury verdict. On appeal, she asserts that insufficient evidence was presented at trial to sustain her conviction and that the district court committed fundamental error by not giving the jury a specific unanimity instruction.

### Statement Of The Facts And Course Of The Proceedings

On August 18, 2012, Officer Hanners pulled over Southwick for driving a vehicle with an expired registration. (Tr., p.11, L.11 – p.12, L.7.) On initial contact, Southwick claimed that the car was hers and that she was in the process of getting it registered. (Tr., p.14, L.23 – p.15, L.13.) Officer Hanners confirmed Southwick's statements about vehicle ownership and checked her paperwork through dispatch. (Tr., p.16, L.5 – p.17, L.7.) As Officer Hanners wrote Southwick a citation for the expired registration and for not having proof of insurance, Deputy Wiggins arrived with his drug dog. (Tr., p.19, L.19 – p.20, L.14.) The drug dog performed an open air sniff on the vehicle and positively alerted on the passenger side door. (Tr., p.46, L.24 – p.47, L.4.)

To facilitate the drug dog's open air sniff, the officers had asked Southwick and her passenger, Mr. Mingo, to exit the vehicle with their dogs. (Tr., p.21, Ls.2-12.) As she exited the vehicle, Southwick said, "Because this is not my car, I'm not responsible for anything in the vehicle." (Tr., p.21, Ls.13-18.) Officer Hanner reminded Southwick that they had already established, through her earlier statements and their investigation through dispatch, that it was in fact her vehicle. (Tr., p.21, Ls.19-24.) While Deputy Wiggins ran his drug dog around the car, Mr. Mingo asked Officer Hanners if it was

illegal to possess scales. (Tr., p.21, Ls.25 – p.23, L.1.) Officer Hanners' follow-up questioning revealed that Mr. Mingo and Southwick had a digital scale in the vehicle, which the officers later discovered. (Tr., p.23, L.17 – p.24, L.5; p.47, Ls.9-17.) Officer Hanners noticed a white powder residue on the scale, which tested positive for methamphetamine. (Tr., p.24, Ls.5-11; p.58, Ls.7-14.) A further search of the vehicle revealed a baggie of methamphetamine in the passenger door. (Tr., p.25, Ls.10-24; p.48, Ls.13-23; p.58, L.18 – p.59, L.7.)

The state charged Southwick with possession of methamphetamine. (R., pp.55-56.) Southwick pleaded not guilty (R., p.74) and stood trial (R., pp.135-38). At the close of trial, the jury returned a guilty verdict. (R., p.167.) The district court entered judgment against Southwick and sentenced her to a unified term of six years with three years fixed, but retained jurisdiction for 365 days. (R., pp.197-201.) Southwick filed a notice of appeal timely from the judgment. (R., pp.203-04.)

## ISSUES

Southwick states the issues on appeal as:

> 1. Did the state present constitutionally sufficient evidence to support the guilty verdict? U.S. Const. Amends. 5 and 14; Idaho Const. Art. I, § 13.
>
> 2. Did the district court commit fundamental error in failing to give a unanimity instruction? U.S. Const. Amends. 5, 6 and 14; Idaho Const. Art. I, § 7.

(Appellant's brief, p.4.)

The state rephrases the issues as:

1. Was substantial competent evidence admitted at trial from which the jury could conclude beyond a reasonable doubt that Southwick was guilty of possession of methamphetamine?

2. Has Southwick failed to show that the district court committed fundamental error by not giving a special unanimity instruction which Southwick never requested and to which she was not entitled?

## ARGUMENT

### I.
### Substantial Competent Evidence Admitted At Trial Supports The Jury's Conclusion That Southwick Was Guilty Of Possession Of Methamphetamine

#### A. Introduction

The state charged Southwick with possession of methamphetamine. (R., pp.55-56.) At the conclusion of her trial, the jury returned a guilty verdict. (R., p.167.) On appeal, Southwick argues that there was insufficient evidence for a jury to convict her of possession of methamphetamine. (Appellant's brief, pp.5-8.) Review of the trial record, however, demonstrates that the jury's verdict is supported by competent evidence presented at trial.

#### B. Standard Of Review

An appellate court will not set aside a judgment of conviction entered upon a verdict if there is substantial evidence upon which a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Miller, 131 Idaho 288, 292, 955 P.2d 603, 607 (Ct. App. 1997); State v. Reyes, 121 Idaho 570, 826 P.2d 919 (Ct. App. 1992). In conducting this review, the appellate court will not substitute its view for that of the finder of fact as to the credibility of witnesses, the weight to be given to the testimony, or the reasonable inferences to be drawn from the evidence. Miller, 131 Idaho at 292, 955 P.2d at 607. The facts, and inferences to be drawn from those facts, are construed in favor of upholding the verdict. Id. In determining whether sufficient evidence to support a conviction was presented at trial, the Court reviews the evidence that was actually presented to the jury without regard to

its ultimate admissibility. State v. Moore, 148 Idaho 887, 894, 231 P.3d 532, 539 (Ct. App. 2010).

C. Southwick's Conviction Is Supported By Substantial Evidence

Idaho Code § 37-2732(c) makes it a crime to possess a controlled substance, such as methamphetamine. Constructive possession is shown where the defendant has knowledge of the controlled substance and the power and intent to control it. State v. Blake, 133 Idaho 237, 242, 985 P.2d 117, 122 (1999). "Constructive possession may be joint or exclusive." Id. Sufficient evidence was presented by which the jury could conclude beyond a reasonable doubt that Southwick possessed methamphetamine.

When initially pulled over, Southwick claimed ownership of the vehicle, telling Officer Hanner that it had been hers for months, though she had neglected to register it. (Tr., p.14, Ls.23 – p.15, L.13.) The police confirmed that the vehicle in fact was Southwick's. (Tr., p.16, L.5 – p.17, L.7.) This evidence, that Southwick owned the vehicle, supports the inference that Southwick intended to control everything found within the vehicle.

Once the drug dog arrived, Southwick suddenly no longer wanted to be the owner of the vehicle, stating, "Because this is not my vehicle, I'm not responsible for anything in the vehicle." (Tr., p.21, Ls.13-18.) Of course, the jury was not required to accept Southwick's self-serving statement, and the officers had, through their investigation, already been able to conclude that the car did in fact belong to Southwick. (See Tr., p.21, Ls.19-21.) But that Southwick felt the need to distance herself from "anything in the vehicle" is also evidence from which the jury could conclude that she

knew there was some sort of contraband in the vehicle. That she felt this need only after a *drug dog* arrived is evidence that Southwick knew the contraband was drugs.

During the search of Southwick's vehicle, officers located both a digital scale with methamphetamine residue on it and a baggie of crystal methamphetamine. (Tr., p.24, Ls.5-11; p.25, Ls.10-24; p.48, Ls.13-23; p.58, Ls.7-14; p.58, L.18 – p.59, L.7.) Southwick admitted that she knew the scale was in the vehicle. (Tr., p.26, L.22 – p.27, L.3.) On appeal, Southwick asserts that the state failed to present evidence from which the jury could conclude that Southwick knew that there was methamphetamine residue on the digital scale. (Appellant's brief, p.6.) In fact, Officer Hanners testified that the scale was contained in a black nylon case and was not recognizable as a digital scale unless the case was opened. (Tr., p.65, Ls.17-19.) Upon opening the case, the officer could see that the scale was coated with methamphetamine residue. (Tr., p.65, Ls.20-25.) Southwick knew that the black case contained a digital scale. (Tr., p.66, Ls.3-11.) In light of Officer Hanners' testimony, that the scale was not recognizable unless and until the case was opened, the jury could conclude that Southwick had also opened the case and knew about the residue.

Southwick also asserts that the state failed to present evidence that she had the intent to control the methamphetamine. (Appellant's brief, pp.6-7.) Among other things, the location of the drugs provides sufficient evidence that Southwick had the intent to control them. The scale was discovered slipped in between a break in the front seat. (Tr., p.47, Ls.9-17.) It was not visible; an armrest was down covering the scale and the officer had to "physically reach in between the seats and remove it." (Tr., p.47, L.18 – p.48, L.5.) Southwick claimed they only stuffed the scale in between the seats to

prevent it from sliding around the dashboard, but if that was true they could have just as easily laid it on top of the bench seat. That she stuffed it so deeply in between the seats, and then covered it with an armrest, suggests at a minimum that she was attempting to hide the scale. In light of the location where officers discovered the baggie of methamphetamine, hidden literally *in* the passenger door panel, the jury could infer that Southwick attempted to hide the drugs. That is sufficient evidence from which it could conclude she intended to control them.

There was sufficient evidence to convict Southwick. The evidence presented supports the inference that the drugs and scale were hidden in Southwick's car with her knowledge, which supports a finding of constructive possession. Because the jury's verdict is supported by the substantial evidence presented at trial, Southwick's claim that she must be acquitted despite the evidence that she possessed methamphetamine must be rejected and her conviction for possession of methamphetamine affirmed.

## II.
## Southwick Has Failed To Show Fundamental Error In Her Unpreserved Claim That The District Court Erred By Not Giving A Specific Unanimity Instruction

### A. Introduction

For the first time on appeal, Southwick asserts that the district court erred by not giving a specific unanimity instruction regarding her possession of methamphetamine. (Appellant's brief, pp.8-10.) Applying the correct legal standards to the facts of this case shows that Southwick was not entitled to a specific unanimity instruction. Because she was not entitled to such an instruction, she has failed to show error, much less fundamental error entitling her to review of this unpreserved claim.

B. Standard Of Review

Whether a jury was properly instructed is a question of law over which the appellate court exercises free review. State v. Draper, 151 Idaho 576, 587-88, 261 P.3d 853, 864-65 (2011) (citing State v. Humphreys, 134 Idaho 657, 659, 8 P.3d 652, 654 (2000)). "An erroneous instruction will not constitute reversible error unless the instructions as a whole misled the jury or prejudiced a party." State v. Shackelford, 150 Idaho 355, 373-74, 247 P.3d 582, 600-01 (2010) (citing Kuhn v. Proctor, 141 Idaho 459, 462, 111 P.3d 144, 147 (2005)).

C. Southwick Has Failed To Show Error, Much Less Fundamental Error, In The District Court's Not Giving A Specific Unanimity Instruction

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000); see also Draper, 151 Idaho at 588, 261 P.3d at 865 ("An error generally is not reviewable if raised for the first time on appeal.") (citing State v. Sheahan, 139 Idaho 267, 277, 77 P.3d 956, 966 (2003)). This same principle applies to alleged errors in jury instructions. See I.C.R. 30(b) ("No party may assign as error the giving of or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the instruction to which the party objects and the grounds of the objection."); Draper, 151 Idaho at 588, 261 P.3d at 865. Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. Id.; see also State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

Southwick did not object to the jury instructions below. Thus, to prevail on appeal, Southwick must show that the complained of instruction rises to the level of fundamental error. Review under the fundamental error doctrine requires Southwick to demonstrate that the error she alleges: "(1) violates one or more of [her] 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." Perry, 150 Idaho at 228, 245 P.3d at 980. Because Southwick was not entitled to a specific unanimity instruction, she has failed to show error in the failure to give such an instruction, much less fundamental error entitling her to review of this unpreserved claim.

Jury verdicts must be unanimous. State v. Shackelford, 150 Idaho 355, 375, 247 P.3d 582, 602 (2010); I.C.R. 31(a). However, "[a]n instruction that the jury must unanimously agree on the facts giving rise to the offense ... is generally not required." State v. Adamcik, 152 Idaho 445, 474, 272 P.3d 417, 446 (2012) (quoting State v. Severson, 147 Idaho 694, 711, 215 P.3d 414, 431 (2009)). The exception to this general rule is when a defendant commits different criminal acts, each of which constitute "separate incidents involving distinct unions of *mens rea* and *actus reas*." Id. at 475, 272 P.3d at 447. Thus, for example, in Severson, the Court held that the defendant, who was charged with murder by poisoning and/or suffocation, or both, was not entitled to a special unanimity instruction "[a]bsent evidence of more than one instance in which Severson engaged in the charged conduct." Severson at 712, 215 P.3d at 432; see also State v. Johnson, 145 Idaho 970, 977, 188 P.3d 912, 919 (2008) (defendant not entitled to a unanimity instruction because "only one criminal act was

charged—first-degree murder—and there was no evidence presented of additional criminal acts").

In this case, the state charged Southwick with a single criminal act, possession of methamphetamine. There was no evidence of separate instances of possession of methamphetamine upon which the state relied in order to prove that charge. The case was based solely around Southwick's single act of possession of methamphetamine on or about August 16, 2012. Therefore, Southwick was not entitled to a special unanimity instruction.

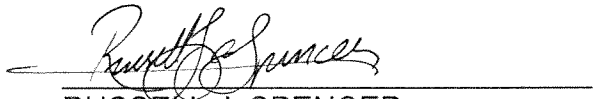
On appeal, Southwick argues that having both methamphetamine residue on her digital scale and a baggie of crystal methamphetamine constitutes two separate acts of possession of methamphetamine. (Appellant's brief, p.10.) It does not. The location where Southwick possessed her drugs, whether in her glove compartment, in the trunk of her vehicle, in her hip pocket, or anywhere else in the car is irrelevant. The relevant inquiry was whether Southwick possessed methamphetamine on or about August 16, 2012. That she had a baggie of crystal methamphetamine and methamphetamine residue on her scale constitutes the crime of possessing methamphetamine; it does not, however, constitute two criminal acts of possession. This is especially true in drug cases where criminal penalties are often graded to the total weight of the illegal substances. (See I.C. § 37-2732B.)

Even had Southwick requested a special unanimity instruction, she would not have been entitled to one. Southwick has failed to show error in the district court's omitting an instruction to which she was not entitled. She has necessarily failed to show fundamental error entitling her to review of this unpreserved claim.

## CONCLUSION

The state respectfully requests that this Court affirm Southwick's conviction.

DATED this 24th day of June, 2014.



RUSSELL J. SPENCER
Deputy Attorney General

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of June, 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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RJS/pm