

3-17-2015

# State v. Razo-Chavez Appellant's Brief Dckt. 42398

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

STATE OF IDAHO,	)	
	)	No. 42398
Plaintiff-Appellant,	)	
	)	Twin Falls Co. Case No.
vs.	)	CR-2013-12233
	)	
BENITO RAZO-CHAVEZ,	)	
	)	
Defendant-Respondent.	)	

**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**

**HONORABLE RANDY J. STOKER  
District Judge**

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State of Idaho**

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DEFENDANT-RESPONDENT**

**FILED - COPY**  
**MAR 17 2015**  
Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
Entered on ATS by \_\_\_\_\_

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## STATEMENT OF THE CASE

### Nature Of The Case

The state appeals from the judgment of conviction upon a guilty verdict to one count of possession of Oxycodone. Although not requesting relief, the state is challenging the district court's modification of the approved elements jury instruction by striking language that belief the substance is a controlled substance satisfies the mental state element of possession of a controlled substance.

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

Officers found Benito Razo-Chavez in possession of a baggie and straw with an orange powder residue that tested positive for two controlled substances: Oxycodone and Buprenorphine, the latter being an ingredient in the brand name drug Suboxone.<sup>1</sup> (Tr., p. 32, L. 5 – p. 36, L. 24; p. 80, L. 25 – p. 89, L. 16.) The state charged Razo with one count of felony possession of Oxycodone. (R., pp. 62-63.) The matter proceeded to trial. (R., pp. 113-15.) At trial Razo admitted possessing Suboxone, but denied any knowledge of the presence of Oxycodone. (Tr., p. 101, L. 5 – p. 103, L. 7; p. 108, L. 24 – p. 109, L. 8; p. 113, Ls. 5-12.)

Over the prosecution's objections, the district court modified the mental state element of the approved jury instruction from "the defendant either knew it was [Oxycodone] or believed it was a controlled substance" to "the defendant either knew it was oxycodone or believed it was oxycodone." (Tr., p. 120, L. 1 –

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<sup>1</sup> Buprenorphine is a Schedule III controlled substance. I.C. § 37-2709(e)(2)(i). Its possession without a prescription is a misdemeanor. I.C. § 37-2732(c)(3).

p. 144, L. 21; R., p. 128 (copy attached as appendix A); ICJI 403 (attached as Appendix B).) Specifically, the district court concluded that the law “requires knowledge that one is in possession of the substance. In other words, what the defendant is charged with, not what he had.” (Tr., p. 140, Ls. 11-15.)

The jury returned a guilty verdict. (R., p. 121.) The district court imposed a sentence of four years with two years determinate, suspended the sentence, and ordered probation. (R., pp. 144-48.) The state filed a notice of appeal timely from entry of the judgment. (R., pp. 159-61.)

ISSUE

Did the district court err when it modified the mental state element of the approved standard jury instructions?

## ARGUMENT

### The District Court Erred When It Modified The Mental State Element Of the Approved Standard Jury Instructions

#### A. Introduction

Over the state's objection, the district court modified the mental state element in the approved elements instruction to require the state to prove that Razo knew or believed the substance was Oxycodone, rather than requiring proof that Razo knew it was Oxycodone or believed it was a controlled substance. (Compare Appendix A with Appendix B.) The state contends the district court erred. Moreover, although the state is not requesting any affirmative relief in this case, this issue is not moot because it is an issue that would otherwise evade review.

#### B. Standard Of Review

Whether a jury was properly instructed is a question of law over which this Court exercises free review. State v. Severson, 147 Idaho 694, 710, 215 P.3d 414, 430 (2009).

#### C. The District Court Erred By Giving A Jury Instruction That Misstated The Law Regarding The Mental State Element Of Possession of A Controlled Substance

"The crime of possession of a controlled substance does not require a specific intent. It only requires the knowledge that one is in possession of the substance and either knowledge of the identity of the substance (e.g., in this case that it was [Oxycodone]), or knowledge that the substance was a controlled substance." State v. Neal, 155 Idaho 484, 487, 314 P.3d 166, 169 (2013)

(internal quotations and citations omitted). The pattern instruction of ICJI 403 correctly states this law. See State v. Tucker, 131 Idaho 174, 177, 953 P.2d 614, 617 (1998) (ICJI 403 is modeled on the language specifically approved in this case, after omitting disapproved language); State v. Hopper, 142 Idaho 512, 513-14, 129 P.3d 1261, 1262-63 (Ct. App. 2005); State v. Amelia, 144 Idaho 332, 333-35, 160 P.3d 771, 772-74 (Ct. App. 2007). “It is clear that if one possesses a controlled substance different from the one he or she thought[,] but believed it to be a controlled substance, that person is guilty of possession of whatever controlled substance it turns out to be.” Tucker, 131 Idaho at 178, 953 P.2d at 618 (Schroeder, J., concurring).

The district court altered the approved instruction that correctly stated the mental state element, and instead gave an incorrect instruction that misstated the law. To the extent Razo relied on a mistake of fact based on his belief that the substance was Suboxone instead of Oxycodone, such did not negate the general intent element of the crime and was not a defense. Because the district court incorrectly stated the law, and created a mistake of fact defense where none exists, the court erred.

The state is cognizant that if Razo was in fact ignorant of the presence of Oxycodone such would be a defense to the charge, even if he was aware of the presence of, and intended to possess, Suboxone. “[T]he defendant’s ignorance of the presence of the substance, or mistaken belief that it was an innocuous material, if believed by the jury, would be exculpatory.” State v. Armstrong, 142 Idaho 62, 64, 122 P.3d 321, 323 (Ct. App. 2005) (quoted in State v. Goggin, 157

Idaho 1, 8, 333 P.3d 112, 118 (2014)). Such was adequately covered by the definition of possession, however, which informed the jury that “[a] person has possession of something if the person knows of its presence and has physical control of it ....” (R., p. 129.) If the jury believed Razo’s testimony that he was in fact ignorant of the presence of Oxycodone, and was aware only of the presence of Suboxone, the jury would have necessarily concluded that he did not “possess” the Oxycodone, as that term is defined by law.<sup>2</sup> It was unnecessary to misstate the mental state element of the crime to make clear to the jury that ignorance of the presence of Oxycodone, if evidence of such was believed by the jury, was a defense to this crime.

D. This Issue Is Not Moot

“An issue becomes moot if it does not present a real and substantial controversy that is capable of being concluded by judicial relief.” State v. Barclay, 149 Idaho 6, 8, 232 P.3d 327, 329 (2010) (quotations and citations omitted). There are three exceptions to the mootness doctrine: “(1) when there is the possibility of collateral legal consequences imposed on the person raising the issue; (2) when the challenged conduct is likely to evade judicial review and thus is capable of repetition; and (3) when an otherwise moot issue raises concerns of substantial public interest.” Id. (citations and quotations omitted).

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<sup>2</sup> Such a scenario would present itself any time two controlled substances are mixed, such as when PCP or methamphetamine is added to marijuana. It is the state’s position that a defendant who possessed marijuana he knew was laced with another controlled substance would be guilty of possession of the lacing agent regardless of ignorance or mistake of exactly what it was, while a defendant ignorant of anything but the marijuana is not guilty of possession of any controlled substance but marijuana.

Although the State is not asking, nor can it be granted, any relief, this issue is not moot because it will evade review and repeat and because it raises concerns of substantial public interest.

The district court reasoned that it could not find “any basis in Idaho law” for the approved instruction, ICJI 403, and concluded the “statute doesn’t say what the instruction says.” (Tr., p. 139, Ls. 20-23.) Moreover, the court concluded that the language of ICJI 403 was not supported by the case law and was incorrect, without regard to the facts of this particular case. (Tr., p. 139, L. 23 – p. 140, L. 21.) Ultimately, the court concluded, the defendant must have knowledge that the substance he possessed was the substance he was charged with possessing, and that belief the substance was a different controlled substance was inadequate to support a conviction. (See Tr., p. 142, Ls. 1-13; p. 143, Ls. 9-21.) Thus, rejection of the approved (and, as shown above, correct) jury instruction means that the juries could be erroneously instructed, and the state’s burden increased, in every controlled substance case handled by this particular district judge, and could even become accepted by other district judges. Although the jury convicted in this case, it is not hard to believe that in a future case a defendant could be acquitted for a mistake of fact that does not legally exonerate him. Thus, this case presents concerns of substantial public interest.

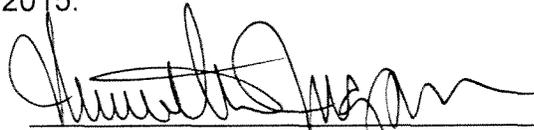
Moreover, the state will not foreseeably have an opportunity to correct this error. Upon either conviction or acquittal, the state will be barred by double jeopardy from seeking any remedy. See State v. Corbus, 151 Idaho 368, 370,

256 P.3d 776, 778 (Ct. App. 2011) (double jeopardy bars state from second prosecution after acquittal or conviction). For these reasons this issue is capable of repetition and likely to evade judicial review. The state's challenge to the district court's ruling is thus not moot.

CONCLUSION

The district court erred by rejecting ICJI 403 because that instruction is a correct statement of the law. Although moot, exceptions allowing appellate review apply. The state therefore requests this court to consider the issue and hold that the district court erred.

DATED this 17th day of March, 2015.

  
\_\_\_\_\_  
KENNETH K. JORGENSEN  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of March, 2015, 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:

DOUGLAS NELSON  
The Roark Law Firm  
409 North Main Street  
Hailey, ID 83333

  
\_\_\_\_\_  
KENNETH K. JORGENSEN  
Deputy Attorney General

KKJ/pm

# APPENDIX A

INSTRUCTION NO. 13A

In order for the defendant to be guilty of Possession of a Controlled Substance, to-wit: Oxycodone, the State must prove each of the following:

1. On or about November 2, 2013,
2. in the State of Idaho,
3. the defendant, BENITO RAZO-CHAVEZ, possessed any amount of oxycodone, and
4. the defendant either knew it was oxycodone or believed it was oxycodone.

If any of the above has not been proven beyond a reasonable doubt, then you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, you must find the defendant guilty.

## APPENDIX B

ICJI 403 POSSESSION OF A CONTROLLED SUBSTANCE

INSTRUCTION NO.

In order for the defendant to be guilty of Possession of a Controlled Substance, the state must prove each of the following:

1. On or about [date]
2. in the state of Idaho
3. the defendant [name] possessed any amount of [name of substance], and
4. the defendant either knew it was [name of substance] or believed it was a controlled substance.

If any of the above has not been proven beyond a reasonable doubt, you must find defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

Comment

I.C. § 37-2732(a). If the charge is possession of a controlled substance by an inmate, see ICJI 604.

If the defendant is charged with "second offense" drug possession, I.C. § 37-2739, that issue should be presented in a bifurcated proceeding.

In *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993), the Supreme Court held that I.C. § 37-2732(c) does not set forth any mental state as an element of the crime of possession of a controlled substance. "Thus, as [this statute] does not expressly require any mental element and I.C. § 18-114 only requires a general intent, we conclude that the offense only requires a general intent, that is, the knowledge that one is in possession of the substance." The Court held that the defendant's lack of knowledge that the substance was illegal (as a controlled substance) was irrelevant.

In order to establish possession of a controlled substance, a defendant need not have actual physical possession of the substance; the state need only prove that the defendant had such dominion and control over the substance to establish

constructive possession. *State v. Kopsa*, 126 Idaho 512, 887 P.2d 57 (Ct. App. 1994). Constructive possession of a controlled substance exists where a nexus between the accused and the substance is sufficiently proven so as to give rise to the reasonable inference that the accused was not simply a bystander but, rather, had the power and intent to exercise dominion and control over the substance. *State v. Rozajewski*, 130 Idaho 644, 945 P.2d 1390 (Ct. App. 1997).

Even trace or residual quantities of cocaine fall within the scope of I.C. § 37-2732(c). *State v. Groce*, 133 Idaho 144, 983 P.2d 217 (Ct. App. 1999).

The statute does not contain a mental element. The committee concluded, based upon *State v. Lamphere*, 130 Idaho 630, 945 P.2d 1 (1997), a mental element as set forth in element 4 should be included.