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# Brown v. State Appellant's Brief Dckt. 42511

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IN THE SUPREME COURT OF THE STATE OF IDAHO

RAYLAND BROWN,	)	
	)	NO. 42511
Petitioner-Appellant,	)	
	)	ADA COUNTY NO. CV 2014-12624
v.	)	
	)	
STATE OF IDAHO,	)	APPELLANT'S BRIEF
	)	
Respondent.	)	
_____	)	

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**BRIEF OF APPELLANT**

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APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA

---

HONORABLE MICHAEL E. WETHERELL  
District Judge

---

SARA B. THOMAS  
State Appellate Public Defender  
State of Idaho  
I.S.B. #5867

KENNETH K. JORGENSEN  
Deputy Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534

ERIK R. LEHTINEN  
Chief, Appellate Unit  
I.S.B. #6247

BEN P. MCGREEVY  
Deputy State Appellate Public Defender  
I.S.B. #8712  
3050 N. Lake Harbor Lane, Suite 100  
Boise, ID 83703  
(208) 334-2712

ATTORNEYS FOR  
PETITIONER-APPELLANT

ATTORNEY FOR  
RESPONDENT

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## STATEMENT OF THE CASE

### Nature of the Case

Rayland Brown appeals from the district court's Judgment dismissing his Petition for Post-Conviction Relief. He asserts that the district court erred when it dismissed his petition for post-conviction relief, because the district court did not have subject matter jurisdiction over the amended charge in the underlying criminal case.

### Statement of the Facts and Course of Proceedings

The State filed an Indictment charging Mr. Brown with forcible sexual penetration by use of a foreign object, felony, in violation of Idaho Code § 18-6608. (R., p.59.) On the second day of the trial, Mr. Brown agreed pursuant to a proposed written plea agreement to plead guilty to an amended charge, filed in an Information, of domestic battery in the presence of a child, felony, in violation of I.C. §§ 18-903, 18-918(2) and 18-918(4). (See R., p.59.) The district court accepted Mr. Brown's conditional guilty plea to the amended charge. (R., p.59.)

At the sentencing hearing, the parties and the district court signed the proposed written plea agreement. (R., p.60.) The district court then imposed a unified sentence of twenty years, with fifteen years fixed, and retained jurisdiction. (R., p.60.) After Mr. Brown participated in a "rider," the district court relinquished jurisdiction and executed the underlying sentence. (See R., p.60.) The district court later granted Mr. Brown's Idaho Criminal Rule 35 motion (*hereinafter* Rule 35) for a reduction of sentence, and reduced the sentence to a unified sentence of twenty years, with eleven years fixed. (R., p.60.)

Mr. Brown filed an appeal, and the Idaho Court of Appeals, in an unpublished decision, affirmed the district court's decision to relinquish jurisdiction and its decision on the Rule 35 motion. (R., p.60.)

Mr. Brown later filed a Petition and Affidavit for Post Conviction Relief. (R., pp.3-14.) In the petition, Mr. Brown asserted that "his trial counsel was ineffective for the reason that he did not object to the sentence which was imposed." (R., p.4.) He asserted that the district court did not follow the plea agreement, and that trial counsel's failure to object to the sentence prejudiced him. (R., p.4.) In the supporting affidavit, Mr. Brown noted that, while the district court in the Judgment of Conviction sentenced him under I.C. §§ 18-903, 18-918(2) and 18-918(4), "according to the court record Petitioner violated the Idaho Code § 18-6608." (See R., p.9.) Mr. Brown also filed a Motion and Affidavit in Support for Appointment of Counsel, requesting that the district court appoint counsel to assist him. (R., pp.21-24.)

The district court then issued an Order Denying Motion for Appointment of Counsel and Notice of Intent to Dismiss Pursuant to I.C. § 19-4906(b). (R., pp.26-32.) The district court determined that the petition "does not state any claim that could be developed into viability even with the assistance of counsel, and the Court will therefore not appoint counsel at this time." (R., p.29.) According to the district court, "the written plea agreement is contained in the record, and the record conclusively rebuts the petitioner's contention that it was breached by the Court (or by the state) such that [trial counsel] had an obligation to raise that issue at sentencing or at any time prior to sentencing." (R., pp.29-30.)

The district court took judicial notice of several documents filed in Mr. Brown's underlying criminal case, the subject of the appeal in Supreme Court Docket No. 41488: the Indictment (No. 41488 R., pp.20-22), the Information (No. 41488 R., pp.60-61), the Rule 11 Plea Agreement (the written plea agreement) (No. 41488 R., pp.74-76), the Judgment of Conviction and Order Retaining Jurisdiction (No. 41488 R., pp.77-80), and the Order Relinquishing Jurisdiction and Commitment (No. 41488 R., pp.87-89). (See R., p.30 n.2.)

The district court determined that "the state fulfilled its commitments by amending the charge as set forth in the agreement," which explained why Mr. Brown "was sentenced for violating a different section, or sections, of the Idaho Code than that set forth in the original indictment." (R., p.30 & n.3.) The State also requested a period of retained jurisdiction. (R., p.30.) "[T]he Court fulfilled its obligations under the plea agreement by retaining jurisdiction." (R., p.30.) Further, "the plea agreement explicitly provided that the Court would not be obligated to place the petitioner on probation following the retained jurisdiction period, and could instead relinquish jurisdiction." (R., p.30.) Thus, because there was no breach of the plea agreement by the district court, trial counsel "had no basis to object on that ground, and did not provide ineffective assistance to the petitioner as alleged." (R., p.30.) The district court determined that Mr. Brown's "claim is plainly frivolous, and he is not entitled to representation at the public expense." (R., p.30.)

The district court also found that the petition as originally submitted "raises no genuine issues of material fact" and that Mr. Brown was not entitled to post-conviction relief. (R., p.30.) The district court accordingly granted Mr. Brown twenty days to



submit responsive briefing explaining specifically how the district court breached the plea agreement. (R., pp.30-31.)

The State filed a Motion for Summary Disposition and Brief in Support of Motion for Summary Disposition, arguing that the State was entitled to summary disposition because Mr. Brown's ineffective assistance of counsel claims did not raise a genuine issue of material fact regarding both deficient performance and resulting prejudice. (R., pp.33-40.)

Mr. Brown then filed, within the twenty-day period, a Petitioner's Brief in Response to the Court Order Pursuant to I.C. § 19-4906(b). (R., pp.41-57.) Mr. Brown asserted that trial counsel "informed him that he was going to be placed on probation" after completing his rider. (R., p.43.) Mr. Brown "was informed by his trial counsel . . . that the plea agreement, included Probation." (R., p.45.) He asserted that trial counsel's failure to object to the sentence prejudiced him. (R., p.45.)

The district court later issued an Order Dismissing Petition Pursuant to I.C. § 19-4906(b). (R., pp.58-65.) According to the district court, Mr. Brown's response to the district court's notice of intent to dismiss did not address the district court's finding that the ineffective assistance of counsel claim did not justify further proceedings, because "he provided no argument or evidence showing that the Court in fact breached the plea agreement." (R., pp.61-62.) "Thus, the claim as originally submitted must be dismissed." (R., p.62.)

The district court further noted that Mr. Brown, in his responsive brief, "argued for the first time that [trial counsel] informed him that 'the plea agreement included Probation[.]'". (R., p.62.) The district court determined that, even assuming trial

counsel had advised Mr. Brown that he should expect to be placed on probation following his rider, “any such misconception could not have survived the petitioner signing the written plea agreement filed” in the underlying criminal case. (R., p.62.) The plea agreement specifically provided that the district court, at the end of the period of retained jurisdiction, would be free to exercise or relinquish jurisdiction. (R., p.62.) The district court also stated that it reviewed the audio recording from Mr. Brown’s change of plea hearing, where the district court specifically advised Mr. Brown that the plea agreement did not guarantee him probation. (R., p.62.)

Thus, even assuming trial counsel had performed deficiently by advising Mr. Brown that the plea agreement guaranteed probation, the district court determined that “Mr. Brown could not (even with the assistance of counsel), show the required prejudice . . . where he was advised to the contrary in open court . . . , and when he signed a written Rule 11 plea agreement containing terms explicitly leaving the issue of probation to the discretion of this Court.” (R., pp.62-63.) The district court dismissed the petition. (R., pp.63, 66-67.)

Mr. Brown filed a Notice of Appeal timely from the district court’s order dismissing his petition for post-conviction relief. (R., pp.68-71.)

## ISSUE

Did the district court err when it dismissed Mr. Brown's petition for post-conviction relief, because the district court did not have subject matter jurisdiction over the amended charge in the underlying case?

## ARGUMENT

### The District Court Erred When It Dismissed Mr. Brown's Petition For Post-Conviction Relief, Because The District Court Did Not Have Subject Matter Jurisdiction Over The Amended Charge In The Underlying Case

#### A. Introduction

Mr. Brown asserts that the district court erred when it dismissed his petition for post-conviction relief, because the district court did not have subject matter jurisdiction over the amended charge in the underlying criminal case. The State filed an amended charge in the Information, the Information alleged a different offense than that alleged in the original Indictment, and the Information was not based on a commitment by a magistrate following a preliminary hearing or its waiver. Thus, the Information did not impart subject matter jurisdiction on the district court.

#### B. Standard Of Review

Although Mr. Brown did not raise this argument before the district court, this Court may reach the question of whether the district court had subject matter jurisdiction over the amended charge in the underlying criminal case because “judgments and orders made without subject matter jurisdiction are void and are subject to collateral attack, and are not entitled to recognition in other states under the full faith and credit clause of the United States Constitution.” See *State v. Lute*, 150 Idaho 837, 840 (2011) (internal quotation marks omitted). “Whether a court lacks jurisdiction is a question of law that may be raised at any time, and over which appellate courts exercise free review.” *State v. Jones*, 140 Idaho 755, 757 (2004) (citation omitted). “Whether an information conforms to the requirements of law is also a question subject to free review.” *Id.*

C. The District Court Did Not Have Subject Matter Jurisdiction Over The Amended Charge In The Underlying Criminal Case

Mr. Brown asserts that district court did not have subject matter jurisdiction over the amended charge in the underlying criminal case, because the Information alleged a different offense than that alleged in the original Indictment and the Information was not based on a commitment by a magistrate following a preliminary hearing or its waiver.

“Subject matter jurisdiction is the power to determine cases over a general type or class of dispute.” *Bach v. Miller*, 144 Idaho 142, 145 (2007). “Subject matter jurisdiction in a criminal case is conferred by the filing of an ‘information, indictment, or complaint alleging an offense was committed with the State of Idaho.” *Jones*, 140 Idaho at 757-58 (internal quotation marks omitted). “Since the indictment or information provides subject matter jurisdiction to the court, the court’s jurisdictional power depends on the charging document being legally sufficient to survive challenge.” *Id.* at 758. To be legally sufficient, a charging document must be both legally sufficient “for the purpose of due process during proceedings in the trial court,” and legally sufficient “for the purpose of imparting jurisdiction.” *Id.*

The Idaho Constitution provides that “[n]o person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate . . . .” Idaho Const. Art. I, § 8. “Because a felony can only be prosecuted by an indictment found by a grand jury or by an information based upon the commitment of a magistrate (following a preliminary hearing or its waiver), Idaho Code section 19-1420 provides, ‘An information or indictment cannot be amended so as to charge an offense other than that

for which the defendant has been held to answer.” *State v. Flegel*, 151 Idaho 525, 526 (2011).

An information may be amended “at any time before the prosecution rests if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.” I.C.R. 7(e); see I.C. § 19-1420. An information “cannot be amended so as to charge an offense other than that for which the defendant has been held to answer.” I.C. § 19-1420. The Idaho Supreme Court has held that “the facts alleged rather than the designation of the offense, control” whether it is proper to amend an information and order a defendant to stand trial on the amended information absent a preliminary hearing. *State v. O’Neill*, 118 Idaho 244, 248-49 (1990) (quoting *State v. Mickey*, 27 Idaho 626, 631 (1915)) (internal quotation marks omitted). Thus, the issue in this case is whether the acts comprising a violation of I.C. §§ 18-903, 18-918(2) and 18-918(4), as set forth and alleged in the Information, are the same acts with which Mr. Brown was charged in the original Indictment alleging a violation of I.C. § 18-6608. *See id.* at 249.

Here, the written plea agreement (as signed by the parties and the district court) provided that, “The State agrees to amend the charge in Count I from Forcible Sexual Penetration with a Foreign Object, a violation of I.C. § 18-6608, to a charge of Domestic Battery in the presence of a child, a violation of I.C. § 18-903, 918(2), 918(4).” (No. 41488 R., p.74.) The Information was therefore essentially an amended information from the original charging document, the Indictment. The Indictment alleged:

That the defendant, RAYLAND BROWN (aka MICHAEL BRADFORD), on or about the 20<sup>th</sup> day of April, 2012, in the County of Ada, State of Idaho, did, for the purpose of sexual gratification, or abuse, cause the penetration

of the vaginal opening of another person, to-wit: N.K., by an object, against the will of N.K. by use of force or violence.

(No. 41488 R., p.20.)

In contrast, the Information alleged:

That the Defendant, RAYLAND BROWN aka MICHAEL BRADFORD, on or about the 20<sup>th</sup> day of April 2012, in the County of Ada, State of Idaho, did actually, intentionally, and unlawfully touch and/or strike the person of Nancy Kummer against her will while in the presence of T.A., a child of the age of 15 years, by punching and/or striking Nancy Kummer, and by committing said battery, did inflict a traumatic injury upon the person of Nancy Kummer, to-wit: lacerations and/or bruising to her face and/or hands and/or ankles, and where Nancy Kummer and the Defendant are household members.

(No. 41488 R., p.61.)

Mr. Brown submits that the Information charged him with a different offense than that charged in the original Indictment. Thus, because the Information was not based upon the commitment of a magistrate following a preliminary hearing or its waiver, the Information did not impart subject matter jurisdiction on the district court.

The Information charged Mr. Brown with a different offense than that charged in the original Indictment because the facts in the Information are different than those originally alleged in the Indictment. *Cf. O'Neill*, 118 Idaho at 249-50 (holding that the amended information in that case was proper because the defendant “had pled guilty to violating I.C. § 18-1506 upon the same facts alleged in the original Information and the Amended Information. . . . No different facts were alleged in the Amended Information”) “[C]aus[ing] the penetration of the vaginal opening of another person,” as alleged in the Indictment, is different from “punching and/or striking” a person, as alleged in the Information. (See No. 41488 R., pp.20, 61.) Further, the violation of the domestic battery in the presence of a child statute alleged in this case is not a lesser included

offense of the forcible sexual penetration with a foreign object statute. *Cf. O'Neill*, 118 Idaho at 250 (“Violation of I.C. § 18-1506 is a lesser included offense when an individual is charged with violations of I.C. § 18-1508.”).

Idaho’s appellate courts have held that, where an amended indictment charges a different crime than the crime charged in the original indictment, and no probable cause determination is made by a grand jury on the amended indictment, the amended indictment is a nullity and the district court is without subject matter jurisdiction. *Flegel*, 151 Idaho at 530; *State v. Schmierer*, \_\_\_ Idaho \_\_\_, 2014 Opinion No. 98, at 6 (Ct. App. 2014), *petition for rev. filed* (Dec. 16, 2014). Mr. Brown asserts that similarly, where an information charges a different crime than the crime charged in the original charging document, and the information is not based on a commitment by a magistrate following a preliminary hearing or its waiver, the information is likewise a nullity and the district court is without subject matter jurisdiction. An information must be “based upon the commitment of a magistrate (following a preliminary hearing or its waiver).” See *Flegel*, 151 Idaho at 526. Neither I.C. § 19-1420 nor I.C.R. 7(e) provides an exception to their ban on amendment of an information to allege a different crime. See *Schmierer*, 2014 Opinion No. 98, at 6.

The Information in this case was not based upon the commitment of a magistrate following a preliminary hearing or its waiver. For example, the written plea agreement did not contemplate returning the case to a magistrate for the issuance of a commitment following a preliminary hearing or its waiver. (See No. 41488 R., pp.74-76.) Similarly,



the Information did not indicate that it was based upon the commitment of a magistrate.<sup>1</sup> (See No. 41488 R., pp.60-61.) Thus, the Information here was not based upon the commitment of a magistrate following a preliminary hearing or its waiver.

Because the Information in this case alleged a different offense than that alleged in the original Indictment and was not based upon the commitment of a magistrate following a preliminary hearing or its waiver, the Information did not impart subject matter jurisdiction on the district court. See *Flegel*, 151 Idaho at 526; *Schmierer*, 2014 Opinion No. 98, at 6. Thus, the district court erred when it dismissed Mr. Brown's petition for post-conviction relief. The order dismissing his petition should be reversed, and his case remanded to the district court.

On remand, because the district court was without subject matter jurisdiction over the amended charge of domestic battery in the presence of a child, the district court should enter an order vacating Mr. Brown's judgment of conviction and sentence. See *Schmierer*, 2014 Opinion No. 98, at 6.

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<sup>1</sup> While the district court did not take judicial notice of it, the Register of Actions in the underlying criminal case also does not show that a commitment was filed. (See No. 41488 R., pp.2-6.)

CONCLUSION

For the above reasons, Mr. Brown respectfully requests that this Court reverse the district court's order dismissing his petition for post-conviction relief and remand his case for further proceedings.

DATED this 20<sup>th</sup> day of January, 2015.



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BEN P. MCGREEVY  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 20<sup>th</sup> day of January, 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:

RAYLAND BROWN  
INMATE #105964  
ISCC  
PO BOX 70010  
BOISE ID 83707

MICHAEL E WETHERELL  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
PO BOX 83720  
BOISE ID 83720-0010  
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH  
Administrative Assistant

BPM/eas