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Brown v. State Respondent's Brief Dckt. 42511

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

RAYLAND BROWN,)	
)	No. 42511
Petitioner-Appellant,)	
)	Ada Co. Case No.
vs.)	CV-2014-12624
)	
STATE OF IDAHO,)	
)	
Respondent.)	
_____)	

BRIEF OF RESPONDENT

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

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MAR - 4 2015

Supreme Court, Court of Appeals
Entered on ATS by

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STATEMENT OF THE CASE

Nature of the Case

Rayland Brown appeals from the summary dismissal of his petition for post-conviction relief.

Statement of Facts and Course of Proceedings

The state charged Brown with the crime of Forcible Sexual Penetration by Use of a Foreign Object, Felony, in violation of Idaho Code § 18-6608. (41488 R., p. 20.¹) The Indictment alleged:

That the defendant, RAYLAND BROWN (aka MICHAEL BRADFORD), on or about the 20th day of April 2012, in the County of Ada, State of Idaho, did, for the purpose of sexual arousal, 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.

(Id.) The state also charged Brown with Battery in violation of Idaho Code § 18-903. (41488 R., p. 75.²) The case proceeded to trial, but on the second day of trial, Brown changed his plea pursuant to a Rule 11 written plea agreement. (R., p. 59.) The parties agreed that Brown would plead guilty to a charge of Domestic Battery in the Presence of a Child and the state would dismiss the Battery charge. (41488 R., pp. 74-76.) Under the Rule 11 plea agreement, the district court agreed to retain jurisdiction, but after the period of retained jurisdiction the court would be free to exercise or relinquish jurisdiction. (Id.)

¹ This Court granted Brown's motion to augment the record with parts of the appellate record from Docket No. 41488 attached as exhibits to Brown's motion to augment the record. Citations to the augmentation follow the format "41488 R."

The state filed an Information. The Information alleged:

That the Defendant, RAYLAND BROWN aka MICHAEL BRADFORD, on or about the 20th day of April, 2012, in the County 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. an child of the age of 15 years by punching and/or striking 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.

(41488 R., pp. 60-61.) Brown plead guilty to the new charge. (R., p. 59.) On December 28, 2012 the district court entered judgment and sentenced Brown to 20 years with 15 years fixed. (41488 R., pp. 77-79.) The district court retained jurisdiction. (Id.) After the period of retained jurisdiction, the district court relinquished jurisdiction. (41488 R., pp. 87-89.) Brown subsequently filed a Rule 35 Motion and appealed his sentence. (R., p. 60.) The district court granted Brown's Rule 35 Motion and reduced the sentence to 20 years with 11 years fixed. (Id.) Brown's sentence was affirmed on direct appeal. (Id.)

On July 27, 2014 Brown filed a Petition and Affidavit for Post Conviction Relief.³ (R., pp. 3-14.) Brown asserted that the district court failed to follow the terms of the Rule 11 plea agreement and his trial counsel was ineffective for not objecting. (R., p. 4.) Brown also moved the district court to appoint post-

² The record on appeal does not include the charging document for Count II – Battery and the district court also could not find such a charging document. (R., p. 28.)

³ Brown's Petition was untimely. It was filed more than 1 year and 42 days after the December 28, 2012 Judgment of Conviction. See I.C. § 19-4902(a); I.A.R. 14(a). Because Brown's Petition challenged the validity of his plea agreement and guilty plea, the period of retained jurisdiction, his Rule 35 Motion and his sentencing appeal did not serve to extend the time period. See State v. Green, 156 Idaho 722, 724-726, 330 P. 3d 1080, 1082-1084 (2014). However, because it was not raised before the district court this statute of limitations defense is not before the appellate court.

conviction counsel. (R., pp. 21-24.) The district court denied his motion for post-conviction counsel, holding in part, that Brown's claim was "plainly frivolous, and he is not entitled to representation at the public's expense." (R., p. 30.) The district court provided Brown 20 days to supplement his claim. (R., pp. 30-31.) The state moved for Summary Dismissal. (R., pp. 33-40.) Brown filed a response. (R., pp. 41-57.) The district court dismissed Brown's Petition with prejudice because there was no evidence that the court did not follow the plea agreement or that Brown's criminal counsel was ineffective. (R. pp. 58-67.) Brown appealed. (R., pp. 68-71.)

ISSUE

Brown states the issue on appeal as:

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?

(Appellant's brief, p. 6.)

The state rephrases the issue as:

Has Brown failed to show that this Court has jurisdiction to consider his new claim and has Brown failed to show the district court erred when it dismissed his petition for post-conviction relief?

ARGUMENT

This Court Cannot Consider Brown's New Claim And The District Court Had Subject Matter Jurisdiction In The Separate Criminal Case

A. Introduction

The district court dismissed Brown's Petition because there was no evidence that the plea agreement was breached and no evidence Brown's criminal counsel was ineffective. (R., pp. 58-63.) On appeal Brown now asserts that the district court did not have subject matter jurisdiction to take his guilty plea in the separate criminal case because the charge to which he pled guilty was not a lesser included charge of the original indictment. (Appellant's brief, p. 7.) This claim fails because it was not raised below and is therefore not preserved and cannot be raised for the first time on post-conviction appeal.

Even if the merits of Brown's unraised cause of action could be considered, the district court in Brown's criminal case did have subject matter jurisdiction to accept his guilty plea. The state filed an Information without a preliminary hearing. The failure to hold a preliminary hearing is not a jurisdictional defect. Brown's guilty plea waived any failure to hold a preliminary hearing and the district court had subject matter jurisdiction.

B. Standard Of Review

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file." Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. Brown's Subject Matter Jurisdiction Claim Cannot Be Considered On Appeal Because It Was Not Set Forth In His Petition For Post-Conviction Relief

Under Idaho law a post-conviction petitioner claiming “[t]hat the court was without jurisdiction to impose sentence ... may institute...a proceeding under this act to secure relief.” I.C. §19-4901(a). Claims not set forth in a petition for post-conviction relief or an amended petition may not be considered on appeal. Small v. State, 132 Idaho 327, 331, 971 P.2d 1151, 1155 (Ct. App. 1998). Brown's Petition did not claim that the criminal court was without jurisdiction to impose sentence. (R., pp. 3-14.) Brown raises this claim for the first time on appeal. (Appellant's brief, p. 7.) Brown's claim is therefore barred and he cannot now raise it for the first time on post-conviction appeal.

Brown asserts that he is permitted to raise a subject matter jurisdiction claim for the first time on appeal and collaterally attack his criminal final judgment because subject matter jurisdiction is question of law that can be raised at anytime. (Appellant's brief, p. 7 (citing State v. Jones, 140 Idaho 755, 757, 101 P.3d 699, 701 (2004).) Brown's assertion fails to acknowledge that a post-conviction proceeding is not an extension of the criminal case from which it arises, rather, it is a separate civil action. See e.g. Schultz v. State, 153 Idaho 791, 799, 291 P.3d 474, 482 (Ct. App. 2012) (citation omitted). None of the cases cited by Brown are post-conviction cases. (See Appellant's brief, pp. 7-12 (citing Jones, 140 Idaho 755, 101 P. 3d 699 (direct appeal); Bach v. Miller, 144 Idaho 142, 158 P.3d 305 (2007) (direct appeal from a civil case); State v. Flegel, 151 Idaho 525, 261 P. 3d 519 (2011) (direct appeal); State v. O'Neill, 118 Idaho

244, 796 P.2d 121 (1990) (direct appeal); State v. Mickey, 27 Idaho 626, 150 P. 39 (1915) (direct appeal); State v. Lute, 150 Idaho 837, 252 P. 3d 1255 (2011) (direct appeal); State v. Schmierer, ___ Idaho ___, ___ P. 3d ___, 2014 Opinion No. 98, 2014 WL 6652924 (Ct. App. 2014) (direct appeal).) Brown does not cite any authority that permits a party in one case to raise a subject matter jurisdiction claim regarding a separate case at any time. Brown's claim was not raised before the district court and it cannot be considered on appeal.

Brown's subject matter jurisdiction claim is also barred because it was not raised on direct criminal appeal. The jurisdiction of a court in a post-conviction proceeding to collaterally attack a final criminal judgment is limited. See Rodgers v. State, 129 Idaho 720, 725, 932 P.2d 348, 353 (1997) (scope of post-conviction relief is limited). It is well-settled in Idaho that a court has no jurisdiction to amend or set aside a judgment once the judgment becomes final unless a statute or rule extends its jurisdiction. See State v. Jakoski, 139 Idaho 352, 354, 79 P.2d 711, 713 (2003). Under the post-conviction statute, any issue which could have, but was not, raised on direct appeal cannot be considered in post-conviction proceedings. I.C. § 19-4901(b); see also Rodgers, 129 Idaho at 725, 932 P.2d at 353. Subject matter jurisdiction, was not raised on direct appeal. See State v. Brown, Docket No. 41488, 2014 Unpublished Opinion, No. 548 (Idaho Ct. App. 2014) (Brown appealed the district court's decision to relinquish jurisdiction and the length of his sentence). Subject matter jurisdiction could have been raised on direct appeal. See e.g. State v. Wolfe, ___ Idaho ___, ___ P.3d, ___, 2015 WL 659545 (Idaho 2015) (subject matter jurisdiction raised on direct appeal); Lewis v. State, 137 Idaho 882, 883-884, 55 P.3d 875,

876-877 (Ct. App. 2002) (subject matter jurisdiction raised on direct appeal could be raised on post-conviction). This Court does not have the jurisdiction to consider Brown's subject matter jurisdiction claim.

Brown's subject matter jurisdiction claim was not raised in his post-conviction petition and was not raised on direct appeal in the criminal case and therefore it cannot be considered for the first time in this post-conviction appeal.

D. The District Court Did Not Lose Subject Matter Jurisdiction When The State Filed An Information To Comply With The Written Plea Agreement

Even if this Court considers the merits of Brown's new claim, the district court is properly affirmed. Brown argues the district court did not have subject matter jurisdiction over the charge to which he pled guilty. (Appellant's brief, p. 8.) The state charged Brown with the crime of Forcible Sexual Penetration by Use of a Foreign Object, Felony, in violation of Idaho Code § 18-6608. (41488 R., p. 20.) Pursuant to written plea agreement, the state filed an Information alleging felony Domestic Battery in the Presence of a Child. (41488 R., pp. 60-61, 74-76.) Brown pled guilty to Domestic Battery in the Presence of a Child. (R., p. 59; 41488 R., pp. 74-76.) Brown now claims the district court did not have subject matter jurisdiction over the felony Domestic Battery in the Presence of a Child because it was 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." (Appellant's brief, p. 8.)

In support of his argument Brown primarily relies upon two cases. (Appellant's brief, pp. 11-12 (citing Flegel, 151 Idaho 525, 261 P. 3d 519; Schmierer, ___ Idaho ___, ___ P. 3d ___, 2014 Opinion No. 98, 2014 WL

6652924.) Neither are applicable here because Brown did not plead guilty to an amended Indictment.

Flegel was indicated by a grand jury for the crime of lewd conduct with a child under sixteen years of age ("Lewd Conduct"). Flegel, 151 Idaho at 526, 261 P.3d at 520. The district court instructed the jury regarding the crime of Lewd Conduct and, as a lesser included offense, sexual abuse of a child under sixteen years of age ("Sexual Abuse"). Id. The jury found Flegel not guilty of Lewd Conduct but could not reach a verdict on Sexual Abuse. Id. "Without resubmitting the matter to a grand jury, the State filed an amended indictment charging Flegel with the crime of Sexual Abuse." Id. A second jury found Flegel guilty of Sexual Abuse. Id. The Idaho Supreme Court reversed and held:

Because Sexual Abuse is not a lesser included offense of Lewd Conduct, Flegel could only be validly charged by indictment with that crime if the matter was resubmitted to a grand jury and it returned the amended indictment. The prosecuting attorney had no authority to issue an amended indictment for a crime that was not charged in the original indictment and that was not an included offense of that crime. Therefore, Flegel's conviction is void, the judgment must be vacated, and this case must be dismissed.

Id. The Court held that a prosecutor should not be allowed to "amend an indictment to charge an offense other than that for which the defendant was held to answer would permit the prosecutor to, in essence, become the grand jury."

Id. at 526-527, 261 P.3d at 520-521.⁴

⁴ Flegel is further distinguished because the district court in Flegel lost jurisdiction because the jury acquitted Flegel of the charges in the Indictment and thus the Indictment was a completely dead letter by the time the prosecutor attempted to amend it after the first trial. Because there was no similar jurisdiction ending event in Schmeirer, the state believes Schmeirer was wrongly decided.

Schmierer was indicted by a grand jury for one count of enticing children over the internet (“Enticement”) and one count of attempted lewd conduct with a minor under the age of sixteen (Attempted Lewd Conduct”). Schmierer, 2014 WL 6652924 at *1. “Pursuant to plea negotiations, and without resubmitting the matter to a grand jury, the State filed an amended superseding indictment in which Count II, attempted lewd conduct, was stricken and a second charge of enticing children over the Internet was substituted. Schmierer agreed to plead guilty to both counts of enticing children over the Internet as charged in the amended indictment.” Id. The Court of Appeals held:

The State was without authority to file the amended indictment. Where an indictment is invalid, the district court is without subject matter jurisdiction. Therefore, not having been issued by a grand jury, the amended indictment was invalid, and the district court was without subject matter jurisdiction over the second count of Internet enticement.

Id. at *4 (citing I.C.R. 7(e); I.C. § 19-1420, Flegel, 151 Idaho at 531, 261 P.3d at 525.) Schmierer is not yet final. On December 15, 2014 the state petitioned the Idaho Supreme Court for review of Schmierer. The petition for review is pending.

Neither Schmierer nor Flegel control the outcome here. In both Schmierer and Flegel the court was concerned about the prosecutor acting as the grand jury and the prosecutor’s power to file an Indictment without convening a grand jury. Here the prosecutor did not file an Amended Indictment. The prosecutor instead filed an Information. (No. 41488, R., pp. 60-61.)

Brown argues that filing the Information without a preliminary hearing deprived the district court of subject matter jurisdiction. (See Appellant’s brief,

pp. 10-11.) Brown is incorrect. An Information requires a preliminary hearing. See I.C. § 19-1308. The failure to hold a preliminary hearing does not raise questions of subject matter jurisdiction. See State v. Pierce, 150 Idaho 1, 4-5, 244 P. 3d 145, 148-149 (2010) (citing In re Marshall, 6 Idaho 516, 56 P. 470 (1899) (the failure to hold a preliminary hearing does not raise subject matter jurisdiction issues because a defendant can waive the right to a preliminary hearing or an indictment by a grand jury). Questions of subject matter jurisdiction cannot be waived. See State v. Manzanares, 152 Idaho 410, 420, 272 P.3d 382, 392 (2012) (citing State v. Rogers, 140 Idaho 223, 227, 91 P.3d 1127, 1131 (2004)). However, the right to waive a preliminary hearing is well-established. State v. Holcomb, 128 Idaho 296, 912 P.2d 664 (Ct. App. 1995); see also State v. Fowler, 105 Idaho 642, 643, 671 P.2d 1105, 1106 (Ct. App. 1983). An Information can be filed if a person waives their right to a preliminary examination. I.C. § 19-1308.

§ 19-1308. Preliminary examination necessary

No information shall be filed against any person for any offense until such person shall have had a preliminary examination therefor, as provided by law, before a justice of the peace, or other examining magistrate or officer, **unless such person shall waive his right to such examination**: provided, that information may be filed without such examination against fugitives from justice, and any fugitive from justice against whom an information shall be filed may be demanded by the governor of this state of the executive authority of any other state or territory, or of any foreign government, in the same manner, and the same proceedings may be had thereon, as provided by law in like cases of demand upon indictment filed.

I.C. § 19-1308 (emphasis added). Since a preliminary hearing can be waived, the failure to hold a preliminary hearing cannot be a jurisdictional defect.

The only question is whether Brown waived his right to a preliminary hearing. It is well settled that a valid plea of guilty, voluntarily and understandingly given, waives all non-jurisdictional defects and defenses, whether constitutional or statutory, in prior proceedings. State v. Dunlap, 123 Idaho 396, 399, 848 P.2d 454, 457 (Ct. App. 1993); Fowler, 105 Idaho at 643, 671 P. 2d at 1106.

In Fowler, the defendant asked the court to overturn his conviction because of a defect in the preliminary hearing process. Fowler claimed "the magistrate committed prejudicial error in letting the state amend the complaint against him – to include the restaurant burglary charge – during the course of the preliminary hearing." Fowler, 105 Idaho at 643, 671 P.2d at 1106. The Idaho Court of Appeals concluded Fowler waived his right to challenge the probable cause determination regarding the added charge once he pled guilty:

[W]e hold that Fowler's plea of guilty to that new charge waived his right to contest the preliminary hearing procedure. The purpose of a preliminary hearing is to determine whether there is probable cause to require the accused to stand trial. It is well settled that a valid plea of guilty, voluntarily and understandingly given, waives all non-jurisdictional defects and defenses, whether constitutional or statutory, in prior proceedings. Here Fowler does not attack the entry and acceptance of his plea. **His plea of guilty to the restaurant burglary therefore constituted a waiver of the procedure to determine probable cause**, just as if he had waived the preliminary hearing itself, on that charge.

Fowler, 105 Idaho at 643, 671 P.2d at 1106 (emphasis added, internal citations omitted).

Brown pled guilty to the charge of Domestic Battery in the Presence of a Child. (R., p. 59.) And since failure to hold a preliminary hearing is not a jurisdictional defect, Brown's guilty plea waived his right to a preliminary hearing

on the charge of Domestic Battery in the Presence of a Child. See Dunlap, 123 Idaho at 399, 848 P.2d at 457; Fowler, 105 Idaho at 643, 671 P. 2d at 1106; Pierce, 150 Idaho at 4-5, 244 P. 3d at 148-149. There was no jurisdictional defect and the district court had jurisdiction to accept Brown's guilty plea and enter judgment.

The state was not barred by Idaho Code § 19-1420 and Idaho Criminal Rule 7(e) from filing the Information alleging Domestic Battery in the Presence of a Child. Idaho Code § 19-1420 and Idaho Criminal Rule 7(e) prohibit amending an indictment or information so as to charge a different offense. See I.C.R. 7(e); I.C. § 19-1420. Idaho Code § 19-1420 and Idaho Criminal Rule 7(e) do not prohibit a prosecutor from filing a new charge and proceeding to grand jury or preliminary hearing on the new charge. Here the prosecutor did not amend the indictment, but instead filed a new charge to which Brown waived preliminary hearing and plead guilty. The district court had subject matter jurisdiction to accept Brown's guilty plea pursuant to his Rule 11 plea agreement.

CONCLUSION

The state respectfully requests this Court to affirm the district court's judgment.

DATED this 4th day of March 2015.



TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 4th day of March 2015, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BEN P. MCGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



TED S. TOLLEFSON
Deputy Attorney General

TST/pm