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State v. McIntosh Appellant's Brief Dckt. 41910

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. MICHELLE FAYE MCINTOSH, Defendant-Appellant.	NO. 41910 ADA COUNTY NO. CR 2013-8935 APPELLANT'S BRIEF

BRIEF OF APPELLANT

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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STATEMENT OF THE CASE

Nature of the Case

Michelle McIntosh was charged with two counts of trafficking in methamphetamine, two counts of delivery of methamphetamine, and one count of possession of drug paraphernalia, and she proceeded to trial. At the close of the State's case, the district court dismissed one of the trafficking charges, and instead instructed the jury that she may be found guilty of possession with the intent to deliver. The jury returned guilty verdicts on all counts.

Ms. McIntosh asserts that, because possession with the intent to deliver is not a lesser included offense of trafficking in methamphetamine by possession, the district court lacked subject-matter jurisdiction over the possession with the intent to deliver allegation, and this Court must vacate her conviction on that charge. Furthermore, Ms. McIntosh asserts that her total unified sentence of 10 years, with 4 years fixed, is excessive in light of the mitigating factors that exist in this case.

Statement of the Facts and Course of Proceedings

An Ada County grand jury indicted Michelle McIntosh on two counts of trafficking in methamphetamine (one count by possession of 28 or more grams, and one count by delivery of 28 or more grams), two counts of delivery of a controlled substance, and one misdemeanor charge of possession of drug paraphernalia. (R., pp.18-20.) The charges arose after her then-boyfriend, out of concern for her wellbeing, informed police that Ms. McIntosh was dealing methamphetamine. (PSI, pp.3-4.)

An undercover police officer made three separate purchases of methamphetamine from Ms. McIntosh: one-eighth of an ounce (Count IV, delivery); one-half ounce a week later (Count III, delivery); and, one full ounce eight days after that

(Count II, trafficking by delivery). (PSI, p.3; *see also* Tr. 12/2/13, p.181, L.4 – p.257, L.20; Tr. 12/3/13, p.28, L.1 – p.158, L.17 (testimony of Det. Coy Brunner).) Ms. McIntosh was arrested shortly after the third sale, and additional methamphetamine (Count I, trafficking by possession), and a pipe (Count V, possession of drug paraphernalia) were found on her. (Tr. 12/3/13, p.195, L.7 – p.202, L.24.)

At the close of the State's case, Ms. McIntosh's counsel moved the court to "partially dismiss count one or dismiss the trafficking component of count one and just leave simple possession of a controlled substance." (Tr. 12/4/13, p.408, Ls.7-17.) After considering the arguments of both parties (Tr. 12/4/13, p.408, L.11 – p.428, L.16), the district court "dismissed" the trafficking charge in Count I and ruled that it would instead instruct the jury on possession of a controlled substance with the intent to deliver (Tr. 12/4/13, p.436, L.18 – p.437, L.17). The jury found Ms. McIntosh guilty of all charges. (R., pp.133-136.)

During the sentencing hearing, the State cited to the fact that Ms. McIntosh took her case to trial, and the "cost that that put on the rest of the community, jurors, this court, the state," and requested that the district court impose a total unified sentence of 19 years, with four and one-half years fixed. (Tr. 1/21/14, p.517, L.22 – p.523, L.25.) Counsel for Ms. McIntosh requested that the court impose a total unified sentence of 5 years, with the mandatory minimum 3 years of fixed time. (Tr. 1/21/14, p.529, Ls.1-7.) The district court sentenced Ms. McIntosh to a unified term of 6 years, with 2 years fixed,[1] on the possession with intent to deliver charge, a unified term of 10 years, with 4 years fixed, on the trafficking charge, unified terms of 7 years, with 2 years fixed, and 8

[1] The Judgment of Conviction and Commitment erroneously states that Ms. McIntosh was convicted in Count I of trafficking in methamphetamine. (R., p.139.) This scrivener's error may be corrected through Idaho Criminal Rule 36.

years 3 fixed, respectively on the delivery charges, and 240 days in jail on the possession of drug paraphernalia charge, with all sentences to run concurrently, for a total unified term of 10 years, with 4 years fixed. (R., pp.138-143; Tr. 1/21/14, p.536, L.21 – p.538, L.13.) Ms. McIntosh filed a timely Notice of Appeal. (R., pp.152-154.)

ISSUES

1. Should this Court vacate Ms. McIntosh's conviction for possession of a controlled substance with the intent to deliver, as the district court did not have subject-matter jurisdiction over that charge?

2. Did the district court abuse its discretion when it imposed upon Ms. McIntosh a total unified term of 10 years, with 4 years fixed, in light of the mitigating factors that exist in her case?

ARGUMENT

I.

This Court Should Vacate Ms. Mcintosh's Conviction For Possession Of A Controlled Substance With The Intent To Deliver, As The District Court Did Not Have Subject-Matter Jurisdiction Over That Charge

A. Introduction

Ms. McIntosh was charged in Count I with trafficking in methamphetamine by possession of 28 grams or more. The district court dismissed that charge and instructed the jury that they could find Ms. McIntosh guilty of possession of methamphetamine with the intent to deliver, and the jury found her guilty of that charge. Because possession of a controlled substance with the intent to deliver is not a lesser included charge of trafficking in methamphetamine by possession, the district court lacked the subject-matter jurisdiction to allow the jury to convict Ms. McIntosh of possession with the intent to deliver. As such, this Court must vacate Ms. McIntosh's conviction for that charge.

B. This Court Must Vacate Ms. McIntosh's Conviction For Possession Of A Controlled Substance With The Intent To Deliver As The District Court Did Not Have Subject-Matter Jurisdiction Over That Charge

Whether or not a district court lacked subject-matter jurisdiction is an issue that can be raised for the first time on appeal. *State v. Miller*, 151 Idaho 828, 832 (2011) (citing *State v. Jones*, 140 Idaho 755, 757 (2004)). A district court gains subject-matter jurisdiction over a felony charge only where that crime is alleged in an Information or Indictment, or where a crime is a lesser included offense of a crime charged in an Information or Indictment. *State v. Flegel*, 151 Idaho 525, 526-527 (2011). Ms. McIntosh was charged in Count I of the Indictment with trafficking in methamphetamine by possession of 28 grams or more. (R., pp.18-19.) As such, the

district court only had subject-matter jurisdiction over a charge of possession of a controlled substance with the intent to deliver, if that charge is a lesser included offense of trafficking in methamphetamine by possession of 28 grams or more, as alleged in Count I of the Indictment.

"'The determination of whether a particular crime is an included offense of the crime charged involves a question of law over which [an appellate] Court exercises free review.'" *Flegel,* 151 Idaho at 527 (quoting *State v. Rosencrantz,* 130 Idaho 666, 668 (1997)). Idaho Courts analyze whether a crime is an included offense of another crime under two theories: the "statutory theory" or the "pleading theory." *Id.* (citations omitted). As will be demonstrated below, under either of these theories, possession of a controlled substance with the intent to deliver is not a lesser included offense of trafficking in methamphetamine by possession of 28 grams or more. Therefore, the district court did not have subject-matter jurisdiction over the possession of a controlled substance with the intent to deliver allegation that Ms. McIntosh was convicted of in Count I, and this Court must vacate that conviction.

1. Under The Statutory Theory, Possession Of A Controlled Substance With The Intent To Deliver Is Not A Lesser Included Offense Of Trafficking In Methamphetamine

Idaho Courts apply the *Blockburger*[2] test to determine whether a crime is a lesser included offense of another under the "statutory theory." *Flegel,* 151 Idaho at 527. "'Under this theory, one offense is not considered a lesser included of another unless it is necessarily so under the statutory definition of the crime.'" *Id.* (quoting *State v. Thompson,* 101 Idaho 430, 433 (1980)). "'An offense will be deemed to be a lesser

[2] *See Blockburger v. United States*, 284 U.S. 299 (1932).

included offense of another, greater offense, if all the elements required to sustain a conviction of the lesser included offense are included within the elements needed to sustain a conviction of the greater offense.'" *Id.* (quoting *State v. McCormick,* 100 Idaho 111, 114 (1979)). The *Flegel* Court determined, "Sexual abuse of a child under the age of sixteen could not be a lesser included offense of Lewd Conduct under the statutory theory because it was possible to commit Lewd Conduct without committing Sexual Abuse." *Id.* 151 Idaho at 529.)

In the present case, because under Idaho law it is possible to commit trafficking in methamphetamine without committing possession of a controlled substance with the intent to deliver, the latter is not a lesser included offense of the former. Idaho Code § 37-2732B(a)(4)(A) reads, in relevant part, as follows,

> Any person who **knowingly delivers, or brings into this state, or who is knowingly in actual or constructive possession of**, twenty-eight (28) grams or more of methamphetamine or amphetamine or of any mixture or substance containing a detectable amount of methamphetamine or amphetamine is guilty of a felony, which felony shall be known as "**trafficking in methamphetamine or amphetamine.**"

I.C. § 37-2732B(a)(4) (emphasis added). The subsequent subsections delineate different penalties, both required and authorized, based upon the amount of methamphetamine the person traffics.

Idaho Code § 37-2732(a) states, "it is unlawful for any person to manufacture or deliver, or **possess with the intent to** manufacture or **deliver**, a controlled substance." I.C. § 37-2732(a). The subsequent subsections delineate the penalties that are authorized depending upon the type of controlled substance the person manufactures, delivers, or has the intent to manufacture or deliver. I.C. § 37-2732.

By the plain language of these statutes, possession with the intent to deliver cannot be a lesser included offense of trafficking in methamphetamine by possession,

because it is possible to commit the crime of trafficking by possession without committing the crime of possession with the intent to deliver. One may possess 28 grams of methamphetamine *without* having the intent to deliver that methamphetamine to another. Alternatively, one may possess less than 28 grams of methamphetamine *with* the intent to deliver it to another, without violating the trafficking statute. Thus, a free review of the statutes involved reveals that possession of a controlled substance with the intent to deliver is not a lesser included offense of trafficking in methamphetamine by possession of 28 grams or more, under the "statutory theory."

2. Under The Pleading Theory, Possession Of A Controlled Substance With The Intent To Deliver Is Not A Lesser Included Offense Of Trafficking In Methamphetamine

The pleading "'theory holds "that an offense is an included offense if it is alleged in the information [or indictment] as a means or element of the commission of the higher offense."'" *Flegel*, 151 Idaho at 529 (quoting *Sivak v. State,* 112 Idaho 197, 211 (1986) (in turn quoting *State v. Anderson,* 82 Idaho 293, 301 (1960)).) The Indictment alleged in Count I that Ms. McIntosh committed trafficking in methamphetamine as follows:

> That the Defendant, MICHELLE FAYE MCINTOSH, on or about the 29th day of May, 2013, in the County of Ada, State of Idaho, did knowingly possess Methamphetamine, to-wit: twenty-eight (28) grams or more of Methamphetamine, a Schedule II controlled substance, or of any mixture or substance containing a detectable amount of Methamphetamine.

(R., pp.18-19.). Among other elements, the jury was specifically instructed that in order to find Ms. McIntosh guilty of possession with the intent to deliver, they must find that she "intended to deliver that substance to another." (R., p.100.)

Because the grand jury did not allege in Count I of the Indictment (as opposed to Count II (*see* R., p.19)), that Ms. McIntosh committed the crime of trafficking in

methamphetamine under the theory that she "delivered" the substance to another, the State did not allege possession of methamphetamine with the "intent to deliver" as a means of committing the crime charged Count I. Thus, a free review of both Count I of the Indictment filed, and the relevant jury instruction, reveals that possession of a controlled substance with the intent to deliver, is not a lesser included offense of trafficking in methamphetamine as charged in Count I, under the "pleading theory."

C. Because The District Court Lacked The Subject-Matter Jurisdiction Necessary To Instruct The Jury On Possession Of A Controlled Substance With The Intent To Deliver, This Court Must Vacate Ms. McIntosh's Conviction In Count I

As demonstrated above, the district court lacked the subject-matter jurisdiction necessary to instruct the jury that they could find Ms. McIntosh guilty of possession of a controlled substance with the intent to deliver, in Count I. Where a conviction is based on a charge over which the district court lacked subject-matter jurisdiction, this Court must vacate the conviction. *See Flegel*, 151 Idaho at 531; *see also State v. Lute*, 150 Idaho 837, 841 (2011). Therefore, this Court must vacate Mr. McIntosh's conviction for possession of a controlled substance with the intent to deliver.

II.

The District Court Abused Its Discretion When It Imposed Upon Ms. McIntosh A Total Unified Term Of 10 Years, With 4 Years Fixed, In Light Of The Mitigating Factors That Exist In Her Case

A. Introduction

Ms. McIntosh asserts that, in light of her acceptance of responsibility, her remorse, her drug addiction and willingness to seek treatment, and the support she receives from her family, the district court imposed an excessive sentence.

B. The District Court Abused Its Discretion When It Imposed Upon Ms. McIntosh A Total Unified Term Of 10 Years, With 4 Years Fixed, In Light Of The Mitigating Factors That Exist In Her Case

Ms. McIntosh asserts that, given any view of the facts, her total unified sentence of 10 years, with 4 years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Ms. McIntosh does not allege that her sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Ms. McIntosh must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145 (1991) (*overruled on other grounds by State v. Brown*, 121 Idaho 385 (1992))). The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384 (1978) (*overruled on other grounds by State v. Coassolo,* 136 Idaho 138 (2001))).

Ms. McIntosh conceded during her opening statement that she was guilty of various drug crimes – she challenged only the claims made in Counts I and that the amount of methamphetamine that she possessed and delivered reached the 28-gram

threshold necessary to support trafficking charges. (Tr. 12/2/13, p.176, L.22 – p.180, L.16.) She readily admitted in her PSI questionnaire that she sold drugs to support her drug habit. (PSI, p.3.) She had been using methamphetamine on a daily basis for the 6 months leading up to her arrest and she did not hold any ill feelings towards her boyfriend who helped arrange the controlled buys, recognizing that he "had 'good intentions' to help her get 'clean.'" (PSI, p.4.) She completed some drug treatment programming while in the county jail and noted that she was open to more treatment, acknowledging that she has a drug problem. (PSI, p.13.)

Ms. McIntosh wrote a letter to the district court stating that her drug abuse not only had a huge effect on her personally, but also "emotionally harmed" those she loved. (PSI, p.153.) She expressed that she felt shame for what she did, and took responsibility for her actions. (PSI, p.153.) Even though she knew the court was required to send her to prison, she felt grateful for what had happened, recognizing that she was on a bad path, and she expressed a desire to use her time in prison to become a better person. (PSI, pp.153-154.) Ms. McIntosh enjoys the support of family and friends. Her sister, Bianca Cota, her aunt, Penny Abel, and her step-sister, Tashina Flappingeagle, all wrote letters in support describing positive aspects of her character. (PSI, pp.96-98.)

Idaho Courts recognize that acceptance of responsibility, remorse, drug addiction and the willingness to seek treatment, and support from family and friends, are all mitigating factors that should counsel towards a lesser sentence. *See State v. Nice*, 103 Idaho 89 (1982); *State v. Shideler*, 103 Idaho 593 (1982); *State v. Alberts*, 121 Idaho 204 (Ct. App. 1991); *State v. James*, 112 Idaho 239 (Ct. App. 1986).

Ms. McIntosh asserts that, in light of the above-mitigating factors, the district court imposed an excessive sentence.

CONCLUSION

Ms. McIntosh respectfully requests that this Court vacate her conviction for possession with the intent to deliver, and further requests that this Court reduce her total sentence to a unified term of 5 years, with 3 years fixed, as requested by her trial counsel.

DATED this 28th day of April, 2015.

JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 28th day of April, 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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