

11-3-2015

# State v. Weatherly Respondent's Brief Dckt. 42777

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"State v. Weatherly Respondent's Brief Dckt. 42777" (2015). *Idaho Supreme Court Records & Briefs*. 5677.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/5677](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/5677)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 42777
Plaintiff-Respondent,	)	
	)	Nez Perce Co. Case No.
vs.	)	CR-2014-4601
	)	
TOBY GLENN WEATHERLY,	)	
	)	
Defendant-Appellant.	)	

RECEIVED  
 IDAHO SUPREME COURT  
 COURT OF APPEALS  
 2015 NOV -3 PM 4:18

---

**BRIEF OF RESPONDENT**

---

**APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF NEZ PERCE**

---

**HONORABLE JAY P. GASKILL**  
 District Judge

---

**LAWRENCE G. WASDEN**  
 Attorney General  
 State of Idaho

**SALLY J. COOLEY**  
 Deputy State Appellate  
 Public Defender  
 P. O. Box 2816  
 Boise, Idaho 83701  
 (208) 334-2712

**PAUL R. PANTHER**  
 Deputy Attorney General  
 Chief, Criminal Law Division

**NICOLE L. SCHAFER**  
 Deputy Attorney General  
 Criminal Law Division  
 P. O. Box 83720  
 Boise, Idaho 83720-0010  
 (208) 334-4534

**ATTORNEYS FOR  
 PLAINTIFF-RESPONDENT**

**ATTORNEY FOR  
 DEFENDANT-APPELLANT**

**FILED - COPY**  
 NOV 03 2015  
 Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
 Entered on ATS by \_\_\_\_\_

IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

STATE OF IDAHO, )  
 ) No. 42777  
 Plaintiff-Respondent, )  
 ) Nez Perce Co. Case No.  
 vs. ) CR-2014-4601  
 )  
 TOBY GLENN WEATHERLY, )  
 )  
 Defendant-Appellant. )  
 )

---

**BRIEF OF RESPONDENT**

---

**APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF NEZ PERCE**

---

**HONORABLE JAY P. GASKILL  
District Judge**

---

**LAWRENCE G. WASDEN  
Attorney General  
State of Idaho**

**PAUL R. PANTHER  
Deputy Attorney General  
Chief, Criminal Law Division**

**NICOLE L. SCHAFER  
Deputy Attorney General  
Criminal Law Division  
P. O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534**

**ATTORNEYS FOR  
PLAINTIFF-RESPONDENT**

**SALLY J. COOLEY  
Deputy State Appellate  
Public Defender  
P. O. Box 2816  
Boise, Idaho 83701  
(208) 334-2712**

**ATTORNEY FOR  
DEFENDANT-APPELLANT**

**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE CASE .....	1
Nature Of The Case .....	1
Statement Of Facts And Course Of Proceedings .....	1
ISSUE .....	2
ARGUMENT .....	3
Weatherly Has Failed To Demonstrate Fundamental Error Based On His Double Jeopardy Claim .....	3
A.    Introduction .....	3
B.    Standard Of Review .....	3
C.    Weatherly Has Failed To Show Fundamental Error In Relation To His Double Jeopardy Claim .....	4
1.    United States Double Jeopardy Constitu- tional Claim .....	6
2.    Idaho Double Jeopardy Constitutional Claim .....	9
CONCLUSION .....	11
CERTIFICATE OF SERVICE .....	11

**TABLE OF AUTHORITIES**

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
<u>Ball v. United States</u> , 470 U.S. 856 (1985) .....	6
<u>Blockburger v. United States</u> , 284 U.S. 299 (1932) .....	passim
<u>State v. Carlson</u> , 134 Idaho 389, 3 P.3d 67 (Ct. App. 2000) .....	3
<u>State v. Corbus</u> , 151 Idaho 368, 256 P.3d 776 (Ct. App. 2011).....	passim
<u>State v. Curtis</u> , 130 Idaho 522, 944 P.2d 119 (1997).....	4
<u>State v. Flegel</u> , 151 Idaho 525, 261 P.3d 519 (2011).....	4
<u>State v. Jones</u> , 151 Idaho 943, 265 P.3d 1155 (Ct. App. 2011).....	3
<u>State v. McCormick</u> , 100 Idaho 111, 594 P.2d 149 (1979) .....	4
<u>State v. Perry</u> , 150 Idaho 209, 245 P.3d 961 (2010).....	passim
<u>State v. Sanchez-Castro</u> , 157 Idaho 647, 339 P.3d 372 (2012).....	4
<u>State v. Santana</u> , 135 Idaho 58, 14 P.3d 378 (Ct. App. 2000) .....	3
 <b><u>STATUTES</u></b>	
I.C. § 18-2403(3).....	7
I.C. § 18-2407(b)(3) .....	7
I.C. § 18-3125(1).....	7
 <b><u>OTHER AUTHORITIES</u></b>	
I.C.J.I. 551 .....	7
I.C.J.I. 822 .....	7

## STATEMENT OF THE CASE

### Nature Of The Case

Toby Glenn Weatherly appeals from the judgment of conviction entered after a jury found him guilty of grand theft and possession of a financial transaction card. Weatherly claims, for the first time on appeal, that his right to be free from double jeopardy was violated when he was convicted of both grand theft and criminal possession of a financial transaction card.

### Statement Of Facts And Course Of Proceedings

The state charged Weatherly with one count of grand theft and one count of criminal possession of a financial transaction card, with a sentencing enhancement alleging Weatherly was a persistent violator of the law. (R., pp.54-57, 81-83.) A jury found Weatherly guilty of both counts as well as finding he had previously been convicted of two felonies. (R., pp.125, 165; JT Tr., p.198, Ls.15-24, p.207, L.23 – p.208, L.7.) The court retained jurisdiction for up to 365 days with underlying concurrent unified 5-year sentences with one-year fixed on each count. (R., pp.164-167; 11/25/14 Tr., p.28, Ls.3-20.) Weatherly filed a timely notice of appeal. (R., pp.171-174, 179-183.)

## ISSUE

Weatherly states the issue on appeal as:

Was Mr. Weatherly twice placed in jeopardy for the same offense when he was convicted of and sentenced for both the greater offense of grand theft of a financial transaction card and the lesser-included offense of possession of a financial transaction card?

(Appellant's brief, p.4.)

The state rephrases the issue on appeal as:

Has Weatherly failed to demonstrate fundamental error based on his claim that he could not be convicted and sentenced for both grand theft and criminal possession of a financial transaction card?

## ARGUMENT

### Weatherly Has Failed To Demonstrate Fundamental Error Based On His Double Jeopardy Claim

#### A. Introduction

Weatherly contends, for the first time on appeal, that “his rights under the Double Jeopardy Clauses of the Idaho Constitution and the Fifth Amendment to the United States Constitution were violated” when a jury found him guilty of both grand theft and criminal possession of a financial transaction card. (Appellant’s brief, p.5.) Weatherly however, failed to raise this claim below, and has failed to show that it constitutes fundamental error.

#### B. Standard Of Review

“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). Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 979 (2010).

Whether a defendant’s prosecution complies with the constitutional protection against double jeopardy is a question of law subject to free review. State v. Santana, 135 Idaho 58, 63, 14 P.3d 378, 383 (Ct. App. 2000). The interpretation and application of a statute is also a question of law subject to de novo review. State v. Jones, 151 Idaho 943, 946, 265 P.3d 1155, 1158 (Ct. App. 2011).



C. Weatherly Has Failed To Show Fundamental Error In Relation To His Double Jeopardy Claim

“There are two theories under which a particular offense may be determined to be a lesser included of a charged offense.” State v. Sanchez-Castro, 157 Idaho 647, 648, 339 P.3d 372, 373 (2012) (quoting State v. Curtis, 130 Idaho 522, 524, 944 P.2d 119, 121 (1997)). Those theories are referred to as the statutory theory and the pleading theory. Sanchez-Castro, 157 Idaho at 648, 339 P.3d at 373 (citations omitted). Idaho appellate courts apply the Blockburger<sup>1</sup> test in analyzing whether an offense is an included offense under the statutory theory. Id. (citing State v. Flegel, 151 Idaho 525, 527, 261 P.3d 519, 521 (2011)). Under this test, an offense is considered included in another 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.” Flegel, 151 Idaho at 527, 261 P.3d at 521 (quoting State v. McCormick, 100 Idaho 111, 114, 594 P.2d 149, 152 (1979)).

Weatherly concedes on appeal that he did not preserve below his argument that double jeopardy, under either the United States or Idaho Constitutions, precluded his convictions for both grand theft and possession of a financial transaction card. (Appellant’s brief, p.5.) Despite his failure to preserve the issue, Weatherly argues that his claims constitute fundamental error. (Appellant’s brief, pp.5-6.) Weatherly is incorrect.

Review under the fundamental error doctrine requires Weatherly to demonstrate the error he alleges: “(1) violates one or more of [his] unwaived

---

<sup>1</sup> Named after Blockburger v. United States, 284 U.S. 299 (1932).

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.

In State v. Corbus, the Idaho Court of Appeals conducted its first post-Perry fundamental error analysis of unpreserved double jeopardy claims made under both the United States and Idaho Constitutions. Corbus, 151 Idaho 368, 256 P.3d 776 (Ct. App. 2011). The Idaho Court of Appeals affirmed Corbus’ conviction. Id. The Court first concluded that under the Blockburger statutory theory, utilized by the Supreme Court of the United States in analyzing double jeopardy claims made under the United States Constitution, reckless driving was not a lesser included offense of felony eluding. Corbus, 151 Idaho at 372-74, 256 P.3d at 780-82. Corbus had therefore failed, the Court concluded, to demonstrate that his United States Constitutional double jeopardy rights were violated (first prong of Perry).

Second, while recognizing that reckless driving and felony eluding *were* the same offense for double jeopardy purposes pursuant to the alternative “pleading theory” utilized in some jurisdictions, the Court held that because it was unclear which theory actually applied under the Idaho Constitution, Corbus could not show “plain error” by relying solely on the pleading theory (second prong of Perry). Corbus, 151 Idaho at 372-74, 256 P.3d at 780-82 (recognizing that the second prong of the Perry test, which requires that the error “plainly exists,” necessitates that the appellant show that existing authorities have unequivocally

resolved the issue in the appellant's favor). The analysis in the present case is nearly identical, and Weatherly has thus failed to show fundamental error on either his federal or state double jeopardy claim.

1. United States Double Jeopardy Constitutional Claim

In Ball v. United States, 470 U.S. 856, 861 (1985), the United States Supreme Court reiterated that the Blockburger, or "statutory" test, is the proper method of determining whether the legislature intended the commission of two crimes to be separately punishable under the United States Constitution:

This Court has consistently relied on the test of statutory construction stated in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932), to determine whether Congress intended the same conduct to be punishable under two criminal provisions. The appropriate inquiry under Blockburger is "whether each provision requires proof of a fact which the other does not." . . . The assumption underlying the Blockburger rule is that Congress ordinarily does not intend to punish the same offense under two different statutes.

See also Corbus, 151 Idaho at 372-74, 256 P.3d at 780-82 (recognizing that the Blockburger rule applied to Corbus' United States Constitution double jeopardy claim).

Contrary to Weatherly's argument on appeal, possession of a financial transaction card is not a lesser included offense of grand theft under the Blockburger statutory theory, and Weatherly has thus failed to meet the first prong of the Perry analysis, that "one or more of [his] unwaived constitutional rights were violated."

The elements of criminal possession of a financial transaction card, as charged in the present case, are: (1) the acquisition of a financial transaction

card without the consent of the cardholder; and (2) the intent to use the financial transaction card to defraud. See I.C. § 18-3125(1); ICJI 822. The elements of grand theft as charged in this case are: (1) the taking or exercise of control over or the transfer of a property interest in a financial transaction card; (2) the owner did not authorize the defendant's action; and (3) the defendant had the intent to deprive the owner of property. See I.C. §§ 18-2403(3), 18-2407(b)(3); ICJI 551. Specifically, Weatherly was charged with grand theft by using the financial transaction card belonging to his brother and sister-in-law to make an unauthorized transfer. (R., pp.56-57.)

The crime of criminal possession of a financial transaction card (I.C. § 18-3125(1)), requires the intent to defraud, while the crime grand theft (I.C. §§ 18-2403(3), 18-2407(b)(3)), does not – the latter crime may be committed by a person who, for example, obtains a financial transaction card with the intent to deprive the owner of the card but does not have the intent to use the financial transaction card to defraud. Grand theft as Weatherly was charged here (I.C. §§ 18-2403(3), 18-2407(b)(3)), requires the transfer of a property interest in the financial transaction card (or, as here, the ultimate use of the card to obtain funds from an ATM), while the crime of criminal possession of a financial transaction card (I.C. § 18-3125(1)), does not – the latter crime may be committed even if there is no actual use of the financial transaction card. Thus, criminal possession of a financial transaction card is not a lesser included offense of grand theft under the statutory, or Blockburger test.

At best, had Weatherly raised this issue below, he could have made a plausible argument that one cannot steal a financial transaction card without possessing it, and that criminal possession of a financial transaction card is thus a lesser included offense of grand theft. However, even if he had made such an argument, Weatherly could not show fundamental error under the second prong of the Perry analysis. The state has found no case where an Idaho appellate court has specifically considered the issue of whether grand theft of a financial transaction card necessarily constitutes criminal possession of a financial transaction card. With no Idaho caselaw on point, Weatherly cannot show “plain error,” i.e. that “existing authorities have unequivocally resolved the issue in the appellant’s favor,” under the second prong of the Perry analysis. See Corbus, 151 Idaho at 372-375, 256 P.3d at 780-84.

Criminal possession of a financial transaction card is not a lesser included offense of grand theft under the Blockburger test because each crime requires an element that the other does not. Even if Weatherly could have presented some argument that the two crimes at issue were in fact “the same crime” pursuant to a Blockburger analysis, he cannot show “plain error” in light of the lack of precedent. Weatherly has thus failed to show fundamental error under the double jeopardy clause of the United States Constitution.

## 2. Idaho Double Jeopardy Constitutional Claim

Weatherly also argues for the first time on appeal a violation of his double jeopardy rights under a “pleadings” analysis. (Appellant’s Brief, pp.11-12.) In support of this argument, Weatherly argues he “was charged by information with one count of grand theft and one count of possession of a financial transaction card, both arising from his possession and one time use of a single prepaid cash card. (Appellant’s brief, p.11 (citation to the record omitted).)

Idaho is among several jurisdictions which have, at least occasionally, utilized the “pleading theory” to determine whether the conviction and punishment for two offenses violates the double jeopardy clause of respective state constitutions. See Corbus, 151 Idaho at 372-375, 256 P.3d at 780-84. Under the “pleading theory,” a court must consider whether the terms of the charging document allege that both offenses arose from the same factual circumstance such that one offense was the means by which the other was committed. Id. Because the pleading theory relies on an examination of the charging information, it generally provides a broader definition of greater and lesser included offenses than a statutory theory approach. Id.

However, as the Idaho Court of Appeals recognized in Corbus, while the Idaho Supreme Court has utilized the pleading theory in the past, it has not done so consistently. In fact, contrary to Weatherly’s conclusory assertion on appeal that “Idaho has adopted the broader ‘pleading theory’” with regard to double jeopardy analysis (Appellant’s brief, p.11), the Idaho Court of Appeals has

recognized that the Idaho Constitution's double jeopardy jurisprudence is anything but clear:

Our review of the Idaho Supreme Court cases including [State v. Stewart, 149 Idaho 383, 234 P.3d 707 (2010); State v. Pizzuto, 119 Idaho 742, 810 P.2d 680 (1991); Sivak v. State, 112 Idaho 197, 731 P.2d 192 (1986); State v. Thompson, 101 Idaho 430, 614 P.2d 970 (1980)] demonstrates the available authority does not provide a clear answer to the question of which analytical theory should be applied in double jeopardy cases which allege a violation of the Double Jeopardy Clause of the Idaho Constitution. It is not clear from existing precedent whether the Blockburger test, the pleading theory used in Thompson, or the pleading theory used in Stewart, Pizzuto, and Sivak should properly be applied in this case. In addition, application of each of these theories would result in contradictory conclusions. Therefore, Corbus has failed, under the second prong of the Perry test, to show fundamental error with regard to his double jeopardy claim which arises under the Idaho Constitution. Consequently, we will not further consider this argument on appeal.

Corbus, 151 Idaho at 375, 256 P.3d at 784.

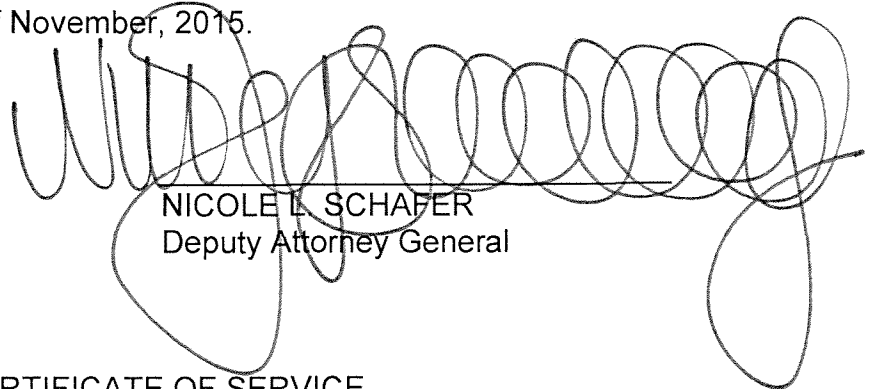
Similarly, Weatherly's Idaho Constitutional double jeopardy claim fails the second prong of a Perry analysis. Weatherly cannot, as he attempts to do, rely on the more forgiving "pleading theory" and show "plain error" under the second prong of Perry, because it is not at all clear whether the "pleading theory" even applies under the Idaho Constitution. Corbus, 151 Idaho at 373, 256 P.3d at 781 (The Perry requirement that the error plainly exists necessitates that the appellant show that existing authorities have unequivocally resolved the issue in the appellant's favor.). A defendant who maintains that the "pleading theory" is indeed the law in Idaho must first raise the issue to the district court.

Weatherly has failed to show fundamental error with regard to either his United States or Idaho Constitutional double jeopardy claims. As such, this Court should thus affirm his convictions.

CONCLUSION

The state respectfully requests this Court affirm Weatherly's convictions and sentences for both grand theft and criminal possession of a financial transaction card.

DATED this 3rd day of November, 2015.



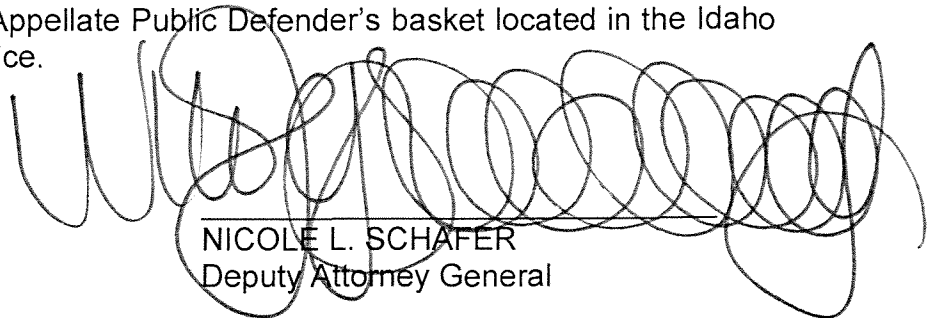
NICOLE L. SCHAFER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 3rd day of November, 2015, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SALLY J. COOLEY  
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.



NICOLE L. SCHAFER  
Deputy Attorney General

NLS/dd