

**IN THE SUPREME COURT OF THE STATE OF IDAHO**

STATE OF IDAHO, )  
 ) No. 46550-2018  
 Plaintiff-Respondent, )  
 ) Franklin County Case No.  
 v. ) CR-2018-310  
 )  
 DONALD NELSON BARGER, JR., )  
 )  
 Defendant-Appellant. )  
 \_\_\_\_\_ )

\_\_\_\_\_  
**BRIEF OF RESPONDENT**  
\_\_\_\_\_

**APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF FRANKLIN**

\_\_\_\_\_  
**HONORABLE MITCHELL W. BROWN**  
District Judge  
\_\_\_\_\_

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

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

**KENNETH K. JORGENSEN**  
Deputy Attorney General  
Criminal Law Division  
P. O. Box 83720  
Boise, Idaho 83720-0010  
(208) 334-4534  
E-mail: [ecf@ag.idaho.gov](mailto:ecf@ag.idaho.gov)

**ATTORNEYS FOR  
PLAINTIFF-RESPONDENT**

**ANDREA W. REYNOLDS**  
Deputy State Appellate Public Defender  
322 E. Front St., Ste. 570  
Boise, Idaho 83702  
(208) 334-2712  
E-mail: [documents@sapd.state.id.us](mailto:documents@sapd.state.id.us)

**ATTORNEY FOR  
DEFENDANT-APPELLANT**

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## STATEMENT OF THE CASE

### Nature Of The Case

Donald Nelson Barger, Jr., appeals from the judgment of the district court on one count of possession of a controlled substance.

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

The state charged Barger with possession of hydrocodone with a persistent violator enhancement. (R., pp. 50-53.) At a pre-trial hearing Barger made a pro-se motion to dismiss for lack of jurisdiction. (6/13/18 Tr., p. 5, L. 17 – p. 7, L. 24.) The basis for the motion was an argument that the state had failed to establish such things as “the name of the accusers,” “the damages,” “the intent jurisdiction,” “the subject matter jurisdiction,” or the “in persona [sic] jurisdiction.” (6/13/18 Tr., p. 7, L. 25 – p. 10, L. 2.) The district court denied the motion. (6/13/18 Tr., p. 10, Ls. 3-4.)

Barger pled guilty to the possession charge, preserving the “right to Appeal prior adverse rulings” by the district court, in exchange for the state dismissing the enhancement. (R., pp. 81-90; 8/30/18 Tr., p. 4, L. 20 – p. 20, L. 11.) The district court imposed a sentence of five years with one year determinate and entered judgment. (R., pp. 95-97.) Barger filed a timely notice of appeal. (R., pp. 98-101.)

## ISSUES

Barger states the issues on appeal as:

- I. Did the district court violate Mr. Barger's constitutional right to due process by failing to order a competency evaluation pursuant to Idaho Code § 18-211?
- II. Did the district court err in denying Mr. Barger's pro se motion to dismiss for lack of jurisdiction?

(Appellant's brief, p. 7.)

The state rephrases the issues as:

1. Was Barger's claim of error for not *sua sponte* ordering an evaluation under I.C. § 18-211 waived by the guilty plea?
2. Has Barger failed to show a lack of jurisdiction in the district court?

## ARGUMENT

### I.

#### Barger's Claim Of Error For Not *Sua Sponte* Ordering An Evaluation Under I.C. § 18-211 Was Waived By The Guilty Plea

##### A. Introduction

Barger contends, for the first time on appeal, that the district court erred by not *sua sponte* ordering a competency evaluation under I.C. § 18-211. (Appellant's brief, pp. 8-15.) This argument fails because it was not preserved in the conditional guilty plea and was therefore waived. Even if the waived claim is considered, Barger has failed to show that the district court committed fundamental error by not ordering an evaluation in the absence of a request from defense counsel.

##### B. Standard Of Review

"A plea agreement is contractual in nature, must be measured by contract law standards, and as a question of law, this Court exercises free review." State v. Cope, 142 Idaho 492, 495, 129 P.3d 1241, 1244 (2006).

Where a claim of error unpreserved by a contemporaneous objection is presented on appeal, the Court applies a three step review. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010). First, the appellant must show that "one or more ... unwaived constitutional rights were violated." Id. Second, "the error must be clear or obvious." Id. "This means the record must contain evidence of the error and the record must also contain evidence as to whether or not trial counsel made a tactical decision in failing to object." State v. Miller, 165 Idaho 115, \_\_\_, 443 P.3d 129, 133 (2019). "If the record does not contain evidence regarding whether counsel's decision was strategic, the claim is factual in nature and thus more appropriately addressed via a petition for post-conviction relief."

Id. Finally, the appellant “must demonstrate that the error affected [his or her] substantial rights.” Perry, 150 Idaho at 226, 245 P.3d at 978. “Whether the error affected the trial proceedings must be clear from the appellate record.” Miller, 165 Idaho at \_\_\_\_, 443 P.3d at 133.

C. Barger’s Guilty Plea Waived Claims Not Based On Rulings Made By The District Court

“Ordinarily, a plea of guilty, if voluntarily and knowingly made, is conclusive as to the defendant's guilt and waives all non-jurisdictional defects in prior proceedings against the defendant.” State v. Green, 130 Idaho 503, 505, 943 P.2d 929, 931 (1997). Thus, an unconditional plea waives the right to challenge a competency finding on appeal. State v. Al-Kotrani, 141 Idaho 66, 69–70, 106 P.3d 392, 395–96 (2005); Green, 130 Idaho at 506, 943 P.2d at 932. “However, non-jurisdictional defects can be preserved for appeal by entering a I.C.R. 11(a)(2) conditional plea of guilty, reserving in writing the right to review any specified adverse ruling.” State v. Kelchner, 130 Idaho 37, 39, 936 P.2d 680, 682 (1997). The Court will not address on appeal non-jurisdictional issues not properly preserved by the unconditional plea. State v. Hosey, 134 Idaho 883, 889, 11 P.3d 1101, 1107 (2000). Unless an issue is preserved in the conditional guilty plea agreement “a defendant may not retain the benefits of a plea bargain in the form of concessions from the State” without waiving unpreserved issues. State v. Wilhelm, 135 Idaho 111, 117, 15 P.3d 824, 830 (Ct. App. 2000).

In this case, Barger preserved the “right to Appeal *prior adverse rulings*” by the district court. (R., p. 89 (emphasis added); see also 8/30/18 Tr., p. 4, L. 20 – p. 20, L. 11.) He has neither shown nor claimed an “adverse ruling” on whether he should be given an

I.C. § 18-211 evaluation. By preserving challenges to rulings of the court, by its plain language the conditional guilty plea waived claims of fundamental error which, by definition, are not challenges to rulings made by the district court. Because there is no adverse ruling challenged by this claim, the claim that the district court erred by not making a ruling on whether Barger should be given a competency evaluation was not preserved but was waived in the plea agreement.

Even if Barger had not waived claims of fundamental error by the plain language of his conditional plea agreement, Barger has still failed to show any of the three parts of a fundamental error claim. “The failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.” State v. Lovelace, 140 Idaho 53, 62, 90 P.3d 278, 287 (2003). “A trial court has no duty to independently inquire as to the competency of a defendant *unless the defendant raised the issue by motion or by presenting evidence showing a lack of competency.*” State v. Hayes, 138 Idaho 761, 764, 69 P.3d 181, 184 (Ct. App. 2003) (emphasis added) (citing State v. Fuchs, 100 Idaho 341, 346, 597 P.2d 227, 232 (1979)). Where, as here, the issue has not been explicitly raised, the trial court must *sua sponte* order a competency evaluation only if the evidence before it raises a good faith or bona fide doubt regarding the defendant’s ability to understand the nature of the proceedings and assist in his own defense. Pate v. Robinson, 383 U.S. 375, 385 (1966); Fuchs, 100 Idaho at 346-47, 597 P.2d at 232-33; Hayes, 138 Idaho at 764, 69 P.3d at 184. See also Williams v. Woodford, 384 F.3d 567, 603-04 (9<sup>th</sup> Cir. 2004) (citations omitted) (state trial judge must *sua sponte* conduct competency hearing if there is “substantial evidence of incompetence”); Bassett v. McCarthy, 549 F.2d 616, 619 (9<sup>th</sup> Cir. 1977)



(citations omitted) (“[D]ue process requires the trial judge to hold a competency hearing on his own motion only where the record as a whole discloses substantial evidence sufficient to raise a genuine doubt in the mind of a reasonable trial judge concerning the defendant’s competence.”). “A person is mentally competent to enter a plea if he understands his right to constitutional due process and counsel, confrontation of witnesses, freedom from compulsion to testify, right to trial by jury, understands the nature of the charge against him, and is capable of understanding the legal consequences of guilt.” Cooper v. State, 96 Idaho 542, 547–48, 531 P.2d 1187, 1192–93 (1975).

The record not only fails to establish a clear and prejudicial constitutional violation, it affirmatively disproves Barger’s claim of fundamental error. First, although Barger had disagreements with his attorney and wanted to present novel legal theories, Barger has cited to nothing in the record indicating he did not understand his rights, the charges, or the consequences of pleading guilty. (Appellant’s brief, pp. 10-11 (Barger made “irrational” jurisdictional arguments and “bizarre” statements, behaved offensively in court, and counsel stated issues with communicating effectively).) Although counsel had some concerns regarding his communications with Barger, counsel did not express concerns regarding Barger’s competency. Dunlap v. State, 141 Idaho 50, 59, 106 P.3d 376, 385 (2004) (“While the opinion of ... counsel certainly is not determinative, a defendant’s counsel is in the best position to evaluate a client’s comprehension of the proceedings.” (internal citations omitted)). More importantly, the district court conducted a thorough plea colloquy, during which Barger testified that he understood his rights and demonstrated an understanding of the plea agreement, the charge, and the consequences of pleading guilty. (8/30/18 Tr., p. 12, L. 16 – p. 20, L. 8.)

Specifically, Barger testified, under oath during his plea colloquy, that he had never been “treated or counseled for any mental illness, disease or disorder.” (8/30/18 Tr., p. 13, Ls. 12-14.) He testified that there was “nothing” about his “mental condition” that would “impair or impact [his] ability to understand” the proceedings. (8/30/18 Tr., p. 13, Ls. 21-25.) He knew the charge was a felony and was able to recite to the court the potential penalties he faced. (8/30/18 Tr., p. 15, Ls. 12-21.) He was satisfied with his counsel’s representation, had discussed the facts of the case and possible defenses with him, and had reviewed with counsel his constitutional and other rights. (8/30/18 Tr., p. 15, Ls. 7-11; p. 16, Ls. 5-11; p. 18, Ls. 10-24.) Barger testified that he understood his constitutional rights, including the presumption of innocence, the right to a jury trial, the state’s burden of proof, his right against compelled self-incrimination, and his right to confrontation of the witnesses against him. (8/30/18 Tr., p. 16, L. 16 – p. 17, L. 19.) The district court, based on the colloquy, specifically found the plea knowingly and voluntarily entered. (8/30/18 Tr., p. 20, Ls. 5-8.)

This record does not raise a good faith or bona fide doubt regarding Barger’s ability to understand the nature of the proceedings and assist in his own defense, much less make it clear that a competency evaluation was required. Nor is it clear on this record that, had the issue been raised, an evaluation would ultimately have been ordered, much less that a finding of incompetency would have been made. None of the three elements of a fundamental error claim—a constitutional error, clear on the record, and prejudicial to the defendant on the face of the record—is present in this case.

Barger affirmatively waived this claim by pleading guilty without preserving any claim that he was entitled to an I.C. § 18-211 competency evaluation. Even if not

affirmatively waived, Barger has shown no fundamental error because it is not clear on the record that the district court should have had a good faith or bona fide doubt regarding Barger's competency in the face of Barger's testimony that he understood the proceedings, the charges, the consequences he faced and his rights, and was able to discuss these things with counsel.

## II.

### Barger Has Failed To Show A Lack Of Jurisdiction In The District Court

#### A. Introduction

Barger claimed the district court lacked jurisdiction because the state had not pled "the name of the accusers," "the damages," "the intent jurisdiction," "the subject matter jurisdiction," or the "in persona [sic] jurisdiction." (6/13/18 Tr., p. 5, L. 17 – p. 10, L. 2.) The district court denied the motion. (6/13/18 Tr., p. 10, Ls. 3-4.)

On appeal Barger, through counsel, recognizes the lack of legal merit to the claim that district court lacked jurisdiction, but nevertheless requests this Court to conclude the district court lacked jurisdiction. (Appellant's brief, pp. 15-16.) As all-but acknowledged, the claim that the district court lacked jurisdiction is without merit.

#### B. Standard Of Review

Jurisdiction is "a question of law" that is reviewed de novo. State v. Schmierer, 159 Idaho 768, 770, 367 P.3d 163, 165 (2016) (citing State v. Lute, 150 Idaho 837, 839, 252 P.3d 1255, 1257 (2011)).

C. The District Court Had Jurisdiction

“Subject matter jurisdiction is the power to determine cases over a general type or class of dispute.” State v. Lute, 150 Idaho 837, 840, 252 P.3d 1255, 1258 (2011) (internal quotes omitted). Idaho courts have “subject matter jurisdiction over a crime if any essential element of the crime, including the result, occurs within Idaho.” State v. Doyle, 121 Idaho 911, 914, 828 P.2d 1316, 1319 (1992). “Subject matter jurisdiction in a criminal case is conferred by the filing of an ‘information, indictment, or complaint alleging an offense was committed in the State of Idaho.’” State v. McIntosh, 160 Idaho 1, 6, 368 P.3d 621, 626 (2016) (quoting State v. Rogers, 140 Idaho 223, 228, 91 P.3d 1127, 1132 (2004)).

The charging document in this case alleges Barger violated Idaho Code section 37-2732(c)(1) in the State of Idaho. (R., p. 50.) It therefore conferred jurisdiction on the district court.

Barger contends that the pleading did not confer jurisdiction because it lacked such allegations as a victim and damages. (Appellant’s brief, p. 15.) Barger cites no legal authority that such allegations are jurisdictional requirements. State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (“When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered.”). Because the charging document alleged Barger committed a crime in the state of Idaho, the district court had jurisdiction.

CONCLUSION

The state respectfully requests this Court to affirm the judgment of conviction.

DATED this 22nd day of August, 2019.

/s/ Kenneth K. Jorgensen  
KENNETH K. JORGENSEN  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 22nd day of August, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

ANDREA W. REYNOLDS  
DEPUTY STATE APPELLATE PUBLIC DEFENDER  
documents@sapd.state.id.us

/s/ Kenneth K. Jorgensen  
KENNETH K. JORGENSEN  
Deputy Attorney General