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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46550-2018
Plaintiff-Respondent,)	
)	
v.)	FRANKLIN COUNTY
)	NO. CR-2018-310
DONALD NELSON BARGER,)	
)	
Defendant-Appellant.)	
_____)	

REPLY BRIEF OF APPELLANT

**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

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STATEMENT OF THE CASE

Nature of the Case

Donald Barger appeals from his judgment of conviction for felony possession of a controlled substance. In his Appellant's Brief, he argued the district court violated his constitutional right to due process by failing to *sua sponte* order a competency evaluation of him pursuant to Idaho Code § 18-211, as the court should have entertained a bona fide doubt as to his competence based in part on his irrational behavior and demeanor before the court. He also argued the district court erred in denying his pro se motion to dismiss for lack of jurisdiction. In its Respondent's Brief, the State contends Mr. Barger cannot raise his due process argument on appeal because he pled guilty to the offense, and did not reserve his right to raise a due process argument on appeal. The State also contends Mr. Barger failed to show the district court lacked jurisdiction. Mr. Barger submits this Reply Brief primarily to respond to the State's argument that he cannot raise his due process argument as fundamental error on appeal.

Statement of Facts and Course of Proceedings

Mr. Barger included a statement of facts and course of proceedings in his Appellant's Brief, which he relies on and incorporates herein. (*See* Appellant's Br., pp.1-6.)

ISSUES

- 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?

ARGUMENT

I.

The District Court Violated Mr. Barger's Constitutional Right To Due Process By Failing To Order A Competency Evaluation Pursuant To Idaho Code § 18-211

A. Introduction

In his Appellant's Brief, Mr. Barger argued that, in light of the substantial evidence that he could not understand the proceedings against him and assist in his defense, the district court should have entertained a bona fide doubt as to his competence, and should have *sua sponte* ordered a competency evaluation of him pursuant to Idaho Code § 18-211. (Appellant's Br., pp.8-15.) He asserted the district court's failure to order a competency evaluation violated his constitutional right to due process and constituted fundamental error. (*Id.*) The State asserts "[t]his argument fails because it was not preserved in the conditional guilty plea" and, in any event, Mr. Barger cannot show fundamental error. (Respondent's Br., pp.3-8.)

B. Mr. Barger Did Not, By Pleading Guilty, Waive His Constitutional Right Not To Be Convicted While Incompetent

The State asserts Mr. Barger cannot raise any allegation of fundamental error on appeal because in his conditional plea, he reserved only his right to challenge the district court's adverse rulings relating to jurisdiction. (Respondent's Br., p.5.) The State is incorrect. Mr. Barger reserved his right to appeal from the district court's jurisdictional rulings, but he did not waive his right to raise a non-jurisdictional issue as fundamental error on appeal.

The Idaho Supreme Court has repeatedly held "an asserted error in a criminal trial raised for the first time on appeal is still reviewable under the fundamental error analysis even if it may have been 'forfeited' below." *State v. Gomez*, 153 Idaho 253, 255-56 (2012) (citation omitted); *see also State v. Carter*, 155 Idaho 170, 174 (2013) (holding "the fundamental error test is the

proper standard for determining whether an appellate court may hear claims based upon unobjected-to error in all phases of criminal proceedings in the trial courts of this state”). This is consistent with the purpose of fundamental error review, which is “to remedy situations where an alleged error may have deprived the defendant of his or her constitutional right to a fair proceeding.” *State v. Lenon*, 143 Idaho 415, 417 (Ct. App. 2005) (citations omitted).

The State cites two cases where the Idaho Supreme Court refused to consider a defendant’s argument that the district court erred in finding the defendant competent to stand trial where the issue was raised and ruled upon below, and where the defendant subsequently entered a non-conditional guilty plea. *See State v. Green*, 130 Idaho 503, 506 (1997) (stating if the defendant “had wished to appeal the district court’s ruling which found him competent to stand trial, he should have sought to enter a conditional plea of guilty to preserve the right to appeal”); *State v. Al-Kotrani*, 141 Idaho 66, 69-70 (2005) (refusing to consider the defendant’s argument that he was incompetent in light of his unconditional plea of guilty where “the trial court found, after a hearing, that the Defendant was competent to stand trial”).

Tellingly, neither *Green* nor *Al-Kotrani* involved an assertion of fundamental error. And the State does not cite a single case where the Idaho Supreme Court or the Idaho Court of Appeals refused to consider a defendant’s argument that the district court erred in failing to *sua sponte* order a competency evaluation. (*See* Respondent’s Br., pp.4-5.) On the contrary, one of the lead cases in this area of the law, *State v. Fuchs*, 100 Idaho 341 (1979), was a case involving an unconditional guilty plea.

In *Fuchs*, the Idaho Supreme Court noted that while the matter of the defendant’s competence “was not procedurally in issue at the time of the guilty plea, that is not the only consideration” because the appeal “raises the question as to what responsibilities are imposed

upon the trial court judge to evaluate a defendant's competence to plead guilty when the defendant's competency has not been put in issue." *Id* at 346. The *Fuchs* Court held "the trial court judge must always be on guard to make certain that there is no violation of federal Fourteenth Amendment due process in any action in criminal court." *Id.* (citations omitted). The Court discussed the problems faced by the trial judge "when the issue of mental capacity has not been raised, and yet a question of competence lurks in the background." *Id.* The Court proceeded to consider, based on the record before it, "whether . . . the district court judge should have entertained a good-faith or bona fide doubt as to the competence of the defendant." *Id.* at 347.

As in *Fuchs*, this Court can and must consider whether the district court committed fundamental error by failing to *sua sponte* order a competency evaluation of Mr. Barger. The State asserts the record "affirmatively disproves Barger's claim of fundamental error" because there is "nothing in the record" to indicate Mr. Barger "did not understand his rights, the charges, or the consequences of pleading guilty." (Respondent's Br., p.6.) As an initial matter, the test for incompetence is broader than the State suggests. A defendant is not competent to be convicted if he cannot consult with his lawyer with a reasonable degree of rational understanding and does not have a rational, as well as a factual, understanding of the proceedings against him. *See State v. Hawkins*, 159 Idaho 507, 512 (2015). Mr. Barger contends that, for the reasons set forth in his Appellant's Brief, the record clearly raises a bona fide doubt as to his competence. (*See Appellant's Br.*, pp.10-14.)

The State points to Mr. Barger's plea colloquy as being all but conclusive evidence that he was competent, but the change of plea hearing represents just one of several hearings that occurred from April to October 2018. And the fact that Mr. Barger told the district court at the change of plea hearing that he had never been treated or counseled for any mental illness, and

was not presently taking any prescription medication, should have raised, rather than lowered, the court's concern in light of Mr. Barger's bizarre and irrational behavior during all of the prior court proceedings. (*See* 8/30/18 Tr., p.13, Ls.12-17.) In this case, the district court's error in failing to order a competency evaluation plainly exists from a review of the appellate record as a whole, and was not harmless. Mr. Barger is thus entitled to relief on appeal.

II.

The District Court Erred In Denying Mr. Barger's Pro Se Motion To Dismiss For Lack Of Jurisdiction

On this issue, Mr. Barger relies on the argument contained in his Appellant's Brief. (*See* Appellant's Br., pp.15-16.)

CONCLUSION

For the reasons stated above, as well as those set forth in his Appellant's Brief, Mr. Barger respectfully requests that this Court vacate his judgment of conviction, and remand this case to the district court with instructions to order a competency evaluation pursuant to Idaho Code § 18-211, and to proceed with further proceedings based on the results of that evaluation. Alternatively, he requests that this Court vacate his judgment of conviction for lack of jurisdiction.

DATED this 12th day of September, 2019.

/s/ Andrea W. Reynolds
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of September, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

KENNETH K. JORGENSEN
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/s/ Evan A. Smith

EVAN A. SMITH
Administrative Assistant

AWR/eas