10-19-2015

# State v. Rome Respondent's Brief Dckt. 43213

IN THE SUPREME COURT OF THE STATE OF IDAHO



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| STATE OF IDAHO, | ) | |
| | ) | No. 43213 |
| Plaintiff-Respondent, | ) | |
| | ) | Kootenai Co. Case No. |
| vs. | ) | CR-2014-3761 |
| | ) | |
| SONNY CHARLES ROME, | ) | |
| | ) | |
| Defendant-Appellant. | ) | |
| | ) | |



BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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District Judge

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## STATEMENT OF THE CASE

### Nature Of The Case

Sonny Charles Rome appeals from his conviction for burglary and the imposition of a sentencing enhancement for being a persistent violator.

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

The state charged Rome with a single count of aiding and abetting a burglary, later amended to include a sentencing enhancement for being a persistent violator. (R., pp. 48-49, 76-77.) Rome filed a motion to dismiss, contending the burglary statute was "unconstitutional on its face." (R., pp. 59-66.) The district court denied the motion. (R., p. 69.)

After a trial a jury found Rome guilty of both the burglary charge and the enhancement. (R., pp. 110-11.) The district court entered judgment, from which Rome filed a timely notice of appeal. (R., pp. 179, 182.)

## ISSUES

Rome states the issues on appeal as:

I. Whether Idaho's Burglary statute violates equal protection as applied by irrationally punishing people who enter spaces surrounded by walls a ceiling more harshly that those that do not.

II. Whether Idaho's Burglary statute, by requiring that a person convicted of the crime be made a felon, imposes cruel and unusual punishment.

III. Whether Idaho's Burglary statute as applied violates the First Amendment by criminalizing thought.

IV. Whether the general rule announced in *State v. Brandt*, 110 Idaho 341 (Ct. App. 1986), is a mechanical rule determined by the existence or non-existence of certain factors or whether the general rule applies wherever the circumstances of the alleged prior convictions show that the defendant had no notice and thus no opportunity to change his conduct between acts.

(Appellant's brief, p. 4 (verbatim).)

The state rephrases the issues as:

1. Has Rome failed to show any constitutional infirmity in the burglary statute?

2. Has Rome failed to show that the enhancement for being a persistent violator does not apply to him?

## ARGUMENT

### I.
### The District Court Correctly Concluded Rome Was Not Entitled To Dismissal Based On Rome's Assertion That The Burglary Statute Violates The First Amendment And The Equal Protection Clause

### A. Introduction

Rome claims, as he did below, that Idaho's burglary statute is unconstitutional because, according to Rome, it violates the Equal Protection Clause, constitutes a cruel and unusual punishment, and violates the First Amendment. (Appellant's brief, pp. 6-21.[1]) Rome's constitutional arguments lack merit because Idaho's burglary statute does not implicate, let alone violate, the Equal Protection Clause, the prohibition against cruel and unusual punishment, or free speech rights guaranteed by the federal and state constitutions.

### B. Standard Of Review

Where the constitutionality of a statute is challenged, the appellate court reviews it de novo. State v. Korsen, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003). The party challenging the constitutionality of the statute must overcome a strong presumption of constitutionality and clearly show the invalidity of the statute. Id. The appellate court is obligated to seek a construction of a statute that upholds its constitutionality. Id.

[1] Identical issues are raised in *State v. Rawlings*, Docket No. 42697, currently scheduled for oral argument before the Idaho Supreme Court on December 9, 2015.

C. The Burglary Statute Does Not Violate The Equal Protection Clause Or The First Amendment

Idaho's burglary statute reads:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, vehicle, trailer, airplane or railroad car, with intent to commit any theft or any felony, is guilty of burglary.

I.C. § 18-1401.

Rome contends the burglary statute violates the Equal Protection Clause and the First Amendment to the United States Constitution. (Appellant's brief, pp. 6-21.) Both of Rome's arguments fail.

1. Idaho's Burglary Statute Does Not Violate The Equal Protection Clause Or The Prohibition Against Cruel And Unusual Punishment

"'The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.'" State v. Hamlin, 156 Idaho 307, 316, 324 P.3d 1006, 1015 (Ct. App. 2014) (quoting City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)). "'Equal protection issues focus on classifications within statutory schemes that allocate benefits or burdens differently among the categories of persons affected.'" Hamlin, 156 Idaho at 316, 324 P.3 at 1015 (quoting In re Bermudes, 141 Idaho 157, 160, 106 P.3d 1123, 1126 (2005)). When evaluating a claim under the Equal Protection Clause, this Court engages in a three-step analysis: first, the Court must "identify the classification that is being challenged"; second, the Court "determine[s] the standard under which the

classification will be judicially reviewed"; and third, the Court must "decide whether the appropriate standard has been satisfied." Id. "Therefore, in order for [Rome] to prevail [on his Equal Protection claim,] he would be required to show that he, by virtue of some classification, is being treated differently than a person who does not share that classification." Hamlin, 156 Idaho at 316, 324 P.3d at 1015.

Idaho's burglary statute does not create any classifications. The statute applies to "every person" who enters an enumerated place "with intent to commit any theft or any felony." I.C. § 18-1401. In other words, the statute treats all individuals the same. As such, Rome "cannot legitimately assert that the State is treating him differently on account of any classification." Hamlin, 156 Idaho at 316, 324 P.3d at 1015. Rome claims otherwise, arguing the burglary statute "separate[s] those like [himself] intending a theft at the moment they enter an enclosed structure, even though no trespass occurs, from those who intend a theft one moment after trespassing within, or who intend prior to entry, decide against the theft, but after entering, change their mind again." (Appellant's brief, p. 8.) This argument is specious. The classification Rome articulates is based on those who commit burglary as defined by the legislature being treated differently than those who do not. All criminal statutes prohibit individuals from committing crimes, but treating those who commit crimes as defined by the legislature differently than those who do not is not a violation of the Equal Protection Clause. Prohibiting the State of Idaho from treating those who break

the law differently from those who do not, as advocated by Rome, would render the entirety of the criminal law void.

Rome also complains that Idaho's burglary statute is an "anomaly" among the states and asserts "no explanation can be given for why [he] deserves to be made a felon under I.C. § 18-1401 when the woman he was convicted of aiding and abetting did not even complete a successful attempted theft under I.C. § 18-306." (Appellant's brief, pp. 9-10.) Rome then engages in an extended discussion of why he does not believe the objectives of sentencing support classifying burglary as a felony, at least in the context of "shoplifting." (Appellant's brief, pp. 12-16.) Rome's argument is long on hyperbole, but short on logic and law. Whether Idaho's burglary statute is an "anomaly" has no bearing on whether the statute violates the Equal Protection Clause. Rome's complaints about his felony status also ultimately have no bearing on his Equal Protection claim because his claim does not survive the first step of the analysis—the existence of a suspect classification—which would require the Court to engage in analysis of whether the classification passes constitutional muster under the applicable standard.

That Rome is not advocating an actual equal protection legal standard is further shown by his failure to identify what level of scrutiny he thinks would apply to his equal protection claim. (See generally Appellant's brief, pp. 10-19.) It is well-established that "[d]ifferent levels of scrutiny apply to equal protection challenges." State v. Doe, 155 Idaho 99, 104, 305 P.3d 543, 548 (Ct. App. 2013). "[S]trict scrutiny applies to fundamental rights and suspect classes;

intermediate scrutiny applies to classifications involving gender and illegitimacy; and rational basis scrutiny applies to all other challenges." Id. (citation omitted). "For analyses made under the Idaho Constitution, slightly different levels of scrutiny apply." Id. Rather than identifying and discussing any applicable equal protection standard, Rome seems to advocate for substituting a "cruel and unusual" framework for review under the mistaken belief that the analyses are "similar." (Appellant's brief, pp. 12-15.) Clearly they are not. Cruel and unusual punishment claims arise out of the Eighth Amendment, applicable to the states through the Fourteenth Amendment Due Process Clause, and Article I, Section 6 ofhe Idaho Constitution, and involve consideration of evolving standards of decency. See State v. Abdullah, ___ Idaho ___, 348 P.3d 1, 70-71 (2015). Unlike equal protection analysis, cruel and unusual punishment analysis does not involve consideration of suspect classes and varying degrees of scrutiny based on those classifications. Ultimately the legal standard advocated by Rome applies to neither equal protection nor cruel and unusual punishment, and is merely advanced as a mechanism to invite this Court to invade the legislative province of defining crimes.

Because it is not based on actual legal standards governing equal protection or cruel and unusual punishment claims, Rome's equal protection and cruel and unusual punishment arguments are meritless.

2. Prohibiting Burglary Does Not Implicate Freedom Of Speech

Rome's First Amendment claim also fails. "As a general matter, the First Amendment means that government has no power to restrict expression

because of its message, its ideas, its subject matter, or its content." United States v. Alvarez, 132 S.Ct. 2537, 2543 (2012) (quotations, brackets, and citation omitted). Thus, content-based restrictions on speech are presumptively invalid and will not be upheld unless the government can demonstrate the restrictions comport with the constitution. Id. at 2544. These principles are not threatened by I.C. § 18-1401 because Idaho's burglary statute does not prohibit any speech, much less speech "because of its message, its subject matter, or its content." The burglary statute prohibits the act of entering specified places with the mental state of intent to commit any theft or any felony. I.C. § 18-1401. The plain language of the statute defeats any claim that it prohibits any sort of speech.

Undeterred by the plain language of the statute, Rome argues that it prohibits "thought crimes" and "chill[s] speech and thought." (Appellant's brief, pp. 17, 20.) It is unclear what "speech" Rome believes was punished in his case. Rome's argument is that "intention" has been "bootstrap[ped]" to "an innocent action," and appears to depend on an implicit premise that "intention" is synonymous with "speech and thought." (Appellant's brief, pp. 17-20.) His apparent belief that criminal intent is speech, and therefore falls within the ambit of First Amendment protections, is frivolous.

Rome's argument that criminal intent is a form of protected speech primarily relies on cases that have nothing to do with speech. For example, Rome, citing Robinson v. California, 370 U.S. 660 (1962), and Justice Ginsburg's dissent in United States v. Balsys, 524 U.S. 666 (1998), writes: "It has long been the stance of this nation that an *actus reus* is required for a crime, and that

'thought crime' is impossible in a civilized society and under the First Amendment." (Appellant's brief, p. 17.) Rome also writes:

> Mere intentions alone cannot make a crime. *See Morissette v. United States*, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil[.]").

(Appellant's brief, p. 17.) This analysis is deeply flawed.

The state agrees that crimes at least generally require a union of act and intent. State v. Nastoff, 124 Idaho 667, 670, 862 P.2d 1089, 1092 (Ct. App. 1993). The burglary statute complies with that requirement because it requires both an act and a criminal intent. The burglary statute does not penalize thought, as Rome suggests. Further, that Rome thinks the act—entry into a defined space—is "not a substantial step toward anything," is irrelevant. (Appellant's brief, pp. 18-19.) The Supreme Court's opinions in Robinson, Balsys, and Morissette do not shed any light on the merits of Rome's First Amendment claim because the cases have nothing to do with the First Amendment. The Court in Robinson held that a California statute that made it a crime "to be addicted to the use of narcotics" inflicted cruel and unusual punishment. 370 U.S. 660. Balsys is a Fifth Amendment case in which the Court held that "concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause." 524 U.S. at 669. And, in Morrissette, the Court held that criminal intent is an essential element of the crime of conversion of Government property, which must be decided by a jury, and the trial court in that case erred by instructing the jury

otherwise. 342 U.S. 246. None of these cases supports Rome's claim of a First Amendment violation.

Finally, to the extent Rome thinks it would be better, and perhaps more constitutional, if the burglary statute read "for the purpose of" instead of "with intent to," such an argument does not establish a First Amendment violation. (Appellant's Brief, pp. 19-20 (quoting a discussion from United States v. Tykarsky, 446 F.3d 458 (3rd Cir. 2006), on the constitutionality of 18 U.S.C. § 2423(b), which prohibits traveling to another state for the purpose of engaging in an unlawful sexual act, and "not[ing] that I.C. § 18-1401 does not contain the 'for the purpose of' provision saving it from constitutional impropriety").) There is no meaningful distinction between the two phrases, much less a distinction that is relevant to Rome's First Amendment argument.

Like his equal protection argument, Rome's First Amendment argument is meritless. Rome has failed to show any error in the district court's denial of is motion to dismiss.

## II.
## Rome Has Failed To Show That The Persistent Violator Enhancement Does Not Apply To Him

### A. Introduction

Rome moved for an acquittal on the persistent violator enhancement, contending that he never had a chance to rehabilitate between prior felony convictions because judgments on the prior convictions were entered the same day. (R., pp. 138-46, 149-50; Tr., p. 156, L. 14 – p. 159, L. 7.) The district court denied the motion. (R., p. 153; Tr., p. 178, L. 23 – p. 183, L. 12.) Rome argues

on appeal that the district court erred. (Appellant's brief, pp. 21-31.) Rome's argument fails because it is contrary to the applicable statutory language.

B. Standard Of Review

The interpretation and construction of a statute present questions of law over which the appellate court exercises free review. State v. Thompson, 140 Idaho 796, 798, 102 P.3d 1115, 1117 (2004); State v. Dorn, 140 Idaho 404, 405, 94 P.3d 709, 710 (Ct. App. 2004).

C. Rome Is A Persistent Violator

"When interpreting statutes we begin with the literal words of a statute, which are the best guide to determining legislative intent." Leavitt v. Craven, 154 Idaho 661, 667, 302 P.3d 1, 7 (2012) (internal quotes, brackets and citation omitted). If the plain language of the statute is unambiguous, "legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." Verska v. Saint Alphonsus Regional Medical Center, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). See also Stringer v. Robinson, 155 Idaho 554, 558, 314 P.3d 609, 613 (2013) (court "not at liberty to disregard the plain language of the Idaho Code"). An ambiguity is not created merely because "two different interpretations of a statute are presented," but a statute is ambiguous only where the "meaning is so doubtful or obscure that reasonable minds might be uncertain or disagree as to its meaning." Farmers Nat. Bank v. Green River Dairy, LLC, 155 Idaho 853, 856, 318 P.3d 622, 625 (2014) (quotations and citations omitted). Moreover, legislative intent,

including the analysis of the plain language, "should be derived from a reading of the whole act at issue." Id. (quotation and citation omitted).

The statute at issue reads, in relevant part: "Any person convicted for the third time of the commission of a felony ... shall be considered a persistent violator of law, and on such third conviction shall be sentenced to a term ... [of] not less than five (5) years and said term may extend to life." I.C. § 19-2514. The state presented evidence that Rome was convicted of more than two felonies prior to this case, and of course he was convicted of a felony in this case as well. (Exhibits, pp. 2-51; R., p. 111.) Under the plain language of the statute he was a "person convicted for the third time" and therefore a "persistent violator."

Because he entered his guilty pleas to the four previous felonies on one day (Exhibits, pp. 4, 21, 38) and was sentenced on those prior convictions on one day (Exhibits, pp. 14, 31, 48), Rome, citing State v. Brandt, 110 Idaho 341, 715 P.2d 1011 (Ct. App. 1986), contends that the persistent violator statute does not apply to him. (Appellant's brief, pp. 21-30.) Application of the relevant legal standards shows this claim to be meritless.

In Brandt the defendant was convicted of escape while in custody after pleading guilty to three other felonies. The court summarized the three prior felony convictions as follows: "Each was the result of a separate crime" arising from three different burglaries at different homes "during a two month period"; each was charged in "a separate information filed on a different day"; and Brandt "pled guilty to all the charges" on one day and "was sentenced" for all three on

another day. Brandt, 110 Idaho at 343, 715 P.2d at 1013. The Court of Appeals set forth the applicable law as follows:

> Generally, we agree with the majority [of courts to consider the issue] that convictions entered the same day or charged in the same information should count as a single conviction for purposes of establishing habitual offender status. However, the nature of the convictions in any given situation must be examined to make certain that the general rule is appropriate.

Id. at 344, 715 P.3d at 1014. Applying this standard, the Court of Appeals concluded that "Brandt fits well within the scope of I.C. § 19-2514." Id.

This case is indistinguishable from Brandt.[2] The first felony at issue was forgery on the bank account of the Snohomish County Young Republicans, committed on February 12, 2007, and charged on September 11, 2007. (Exhibits, p. 36.) The second felony at issue was forgery on the bank account of Marni Mead and Leonard Hoopaw committed on March 14, 2007, and charged by information filed on June 6, 2007. (Exhibits, p. 2.) The third felony at issue started as single count of robbery, charged on May 16, 2007, but was amended to third degree assault of Ed Coleman and grand theft from Home Depot committed on April 14, 2007 (Exhibits, pp. 17, 19.) As in Brandt, "[t]he three offenses here were charged in three separate informations and each charge

[2] The state notes that the court in Brandt did not engage in any analysis of the statutory language. Nothing in the statutory language of I.C. § 19-2514 suggests that Rome is entitled to even have the fact his guilty pleas and judgments were entered on the same day considered in relation to whether he is a "persistent violator." The implicit assumption in Brandt, that the legislature contemplated only post-conviction-of-a-felony rehabilitation and did not intend pre-conviction-of-a-felony deterrence, is simply unwarranted under the plain language of the statute. Regardless, the statute clearly applies under circumstances such as presented in this case, where the defendant commits three or more felonies that are clearly separate and distinct in all respects.

represented a separate crime occurring in a separate location with a separate victim." Brandt, 110 Idaho at 344, 715 P.3d at 1014. See also State v. Smith, 116 Idaho 553, 559-60, 777 P.2d 1226, 1232-33 (Ct. App. 1989) (convictions for "distinguishable incidents of criminal conduct" properly treated as "evidence of multiple prior felonies").

On appeal Rome argues "there are two theories as to what the general rule intends—a mechanical theory, and a Due Process theory," and advocates application of the latter. (Appellant's brief, p. 28.) He claims the due process theory is "a constitutional ban on increasing the penalty on a felony to life where a defendant has not been given the chance from his last felony conviction to rehabilitate having had notice of the enhanced penalties." (Appellant's brief, pp. 29-30.) This argument enjoys no legal support. Rome claims a "Due Process theory" was employed in State v. Saviers, 156 Idaho 324, 325 P.3d 665 (Ct. App. 2014) (Appellant's brief, pp. 22-23, 28), but the phrase "due process" appears nowhere in the opinion. The phrase "due process" is also absent from the other cases cited by Rome which involve application of I.C. §19-2514, *to wit* State v. Brandt, 110 Idaho 341, 715 P.2d 1011 (Ct. App. 1986), State v. Clark, 132 Idaho 337, 971 P.2d 1161 (Ct. App. 1998), State v. Harrington, 133 Idaho 563, 990 P.2d 144 (Ct. App. 1999), State v. Mace, 133 Idaho 903, 994 P.2d 1066 (Ct. App. 2000), and State v. Self, 139 Idaho 718, 85 P.3d 1117 (Ct. App. 2003), and due process is discussed in State v. Smith, 116 Idaho 553, 777 P.2d 1226 (Ct. App. 1989), only in relation to other claims. (Compare Appellant's brief, pp. 22-28 (citing cases addressing persistent violator enhancement).) Because Rome has

cited no legal authority directly or indirectly supporting his claim that there is a "due process theory" creating a "ban" on increasing the penalty for a repeat offender who has not had multiple opportunities for rehabilitation, this argument is waived. Van v. Portneuf Medical Center, Inc., 156 Idaho 696, 706, 330 P.3d 1054, 1064 (2014) (appellate issue waived by failing to provide "pertinent authority or argument"); State v. Boehm, 158 Idaho 294, ___, 346 P.3d 311, 318 (Ct. App. 2015) (claims must be supported by cogent argument and legal authority to be considered on appeal). Even if the lack of legal support does not result in waiver, such complete lack of relevant authority renders the argument specious.

Rome's prior felonies, committed at different times, charged in separate informations, and involving different victims, were distinguishable incidents of criminal conduct for purposes of application of the persistent violator statute. Rome's argument that there is a "Due Process theory" "ban" on considering the three convictions as three convictions is specious. He has therefore failed to show error in the finding he is a persistent violator.

## CONCLUSION

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

DATED this 19th day of October, 2015.

KENNETH K. JORGENSEN
Deputy Attorney General

## CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 19th day of October, 2015, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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