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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**Nos. 46887-2019 & 46928-2019**
Plaintiff-Respondent,	)	
	)	**Ada County Case Nos.**
v.	)	**CR01-18-28501 & CR01-18-39645**
	)	
TABATHA RANA FRAKES,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE STEVEN J. HIPPLER
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

COLLEEN D. ZAHN
Deputy Attorney General
Chief, Criminal Law Division

KALE D. GANS
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534
E-mail: ecf@ag.idaho.gov

ATTORNEYS FOR PLAINTIFF-RESPONDENT

ROBYN FYFFE
Fyffe Law, LLC
800 W. Main St., Ste. 1460
Boise, Idaho 83702
(208) 338-5231
E-mail: robyn@fyffelaw.com

ATTORNEY FOR DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

Nature Of The Case

Tabatha Rana Frakes appeals from her judgment of conviction and sentences for trafficking methamphetamine and conspiracy to traffic methamphetamine.

Statement Of The Facts And Course Of The Proceedings

On June 13, 2018, Boise Police Officer Green received a report from the Treasure Valley METRO Violent Crimes Task Force that a red Dodge Caravan was transporting "a large amount of methamphetamine" from Nevada into Idaho. (Tr., p.177, L.22 – p.178, L.4; PSI, p.3.) Officer Green, who was asked to assist, stopped the van for a series of traffic infractions. (Tr., p.177, L.13 – p.179, L.18; p.183, Ls.18-23.)

Frakes was driving the van. (Tr., p.184, Ls.13-17.) She told Officer Green that she and her two passengers were roommates; that they had been searching for Frakes's father in California; but that now they were heading home. (Tr., p.186, Ls.14-23.) Frakes also admitted she did not have a driver's license. (Tr., p.184, L.23 – p.185, L.2.) The officers ordered Frakes and her passengers (later identified as Athena Kay Lopez and Douglas William Lopez) out of the van and ran a drug detection K-9 around it. (Tr., p.187, L.23 – p.188, L.5; p.191, L.23 – p.192, L.10; p.193, L.13 – p.194, L.1.)

The K-9 alerted on the van and Officer Green searched it. (Tr., p.193, L.24 – p.194, L.10.) Inside he found a bag on the front passenger floorboard, which contained plastic baggies and glass pipes with a white substance. (Tr., p.200, Ls.3-22; State's Exs. 4b, 4c.) Officer Green also found a glass pipe with white substance on the center floorboard between the two front seats. (Tr., p.194, L.22 – p.195, L.5.) He additionally found a blue duffel bag in the center floorboard

that contained male clothing, a large saran-wrapped bundle, and one plastic ziplock bag with ten saran-wrapped "smaller individual bundles." (Tr., p.204, L.15 – p.206, L.5; State's Ex. 6c.) All the bundles contained white crystalline powder that tested presumptive positive for methamphetamine. (Tr., p.207, Ls.8-21.) "The total package weight" of all the methamphetamine found inside the van was 954 grams. (Tr., p.389, Ls.16-22.)

The state charged Frakes with possession of drug paraphernalia and with trafficking methamphetamine, alleging she "did bring to this state and/or knowingly possess four hundred (400) grams or more of Methamphetamine." (R., p.32.) The state similarly charged the Lopezes with trafficking methamphetamine (PSI, p.4), and moved to consolidate Frakes's case with the Lopezes', which the court granted (R., p.14). Frakes pleaded not guilty and the case was set for trial. (R., p.35.)

Frakes was subsequently indicted for an additional charge of conspiracy to traffic in methamphetamine. (R., pp.158-60.) The state alleged that from January 2018 through June 2018, Frakes and the Lopezes "did willfully and knowingly combine, conspire, confederate and agree to traffic" in methamphetamine through a variety of overt acts. (R., pp.158-59.) The conspiracy charge was consolidated with the paraphernalia and the trafficking charge. (R., pp.41-42, 46-47, 167-68.) Prior to Frakes's trial, the state entered into a plea bargain with the Lopezes, whereby they agreed to plead guilty "to a reduced charge of conspiracy to traffic in methamphetamine at the 200-gram or more level." (Tr., p.270, Ls.4-10.)

Frakes's case went to trial. (See Tr., pp.11-541.) The state called the Lopezes to testify; they affirmed, among other things, that they regularly made "trips to California in order to pick up large quantities of methamphetamine" to sell and that they asked Frakes "to help on the trips to California." (Tr., p.317, L.17 – p.320, L.9.) Douglas Lopez specifically affirmed that Frakes

"[knew] the purpose of" the June 13 trip, that "she knew what we were doing," and that they offered her "three or $400" to drive them. (Tr., p.321, Ls.2-12.) The state's lab expert, who tested over 400 grams of the "crystallin[e] material" found in the van, opined that it "contained methamphetamine." (Tr., p.424, Ls.1-10.)

The jury found Frakes guilty of trafficking, possession of paraphernalia, and conspiracy to traffic methamphetamine. (Tr., p.536, L.4 – p.537, L.3.) The district court imposed the mandatory minimum fixed ten-year sentences for the trafficking and conspiracy charges, to be served concurrently, and gave Frakes credit for time served for the paraphernalia charge. (Tr., p.560, L.22 – p.561, L.11.) Thereafter, Frakes moved the court to reconsider her sentence (R., p.251), which the court denied for lack of "any supporting documentation and/or evidence or argument in support" (R., p.262).

Frakes timely appealed. (R., pp.252-54.)

ISSUES

Frakes states the issues on appeal as:

1. Must this Court vacate Tabatha's sentences pursuant to I.C. § 37-2732B(a)(4)(C) because requiring the district court to impose fixed 10 year terms unconstitutionally infringes on the judiciary's inherent authority to suspend a sentence under Article V, § 13 of the Idaho Constitution?

2. Must this Court vacate Tabatha's sentences because the state's decision to permit the district court to sentence the Lopezes under I.C. § 37-2732B(a)(4)(B) in exchange for their assistance in ensuring that Tabatha was sentenced under I.C. § 37-2732B(a)(4)(C) violated her rights to equal protection and due process under Article 1, Sections 2 and 13 of the Idaho Constitution and under the Fourteenth Amendment to the United [States] Constitution and impermissibly infringed on her privilege against self-incrimination and rights to trial under Article 1, Sections 7 and 13 of the Idaho Constitution and under the Fifth and Sixth Amendments to the United States Constitution?

3. Must this Court vacate Tabatha's judgment of conviction for trafficking in methamphetamine because insufficient evidence supported the verdict and the conviction therefore violates due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Section 13 of the Idaho Constitution?

(Appellant's brief, pp.8-9.)

The state rephrases the issues as:

1. Has Frakes failed to show fundamental error with respect to any of her unpreserved constitutional claims?

2. Has Frakes failed to show insufficient evidence supported the jury's verdict for trafficking methamphetamine?

ARGUMENT

I.
Frakes Fails To Show Fundamental Error With Respect To Any Of Her Unpreserved Constitutional Claims

A. Introduction

For the first time on appeal, Frakes alleges that the imposition of fixed sentences under Idaho Code Section 37-2732B "unconstitutionally infringes on the judiciary's inherent authority to suspend a sentence." (Appellant's brief, p.8.) And she alleges, for the first time on appeal, that the state's decision to charge her with trafficking a greater amount of methamphetamine than her co-conspirators "violated her rights to equal protection and due process," among other purported constitutional violations. (Id.) None of these newfound arguments are preserved. Moreover, Frakes never says that any of these purported errors are fundamental (see Appellant's brief)—a necessary predicate for making constitutional claims for the first time on appeal.

At any rate, Frakes fails to show any fundamental error. Idaho Code Section 37-2732B is constitutional and the Idaho Supreme Court has repeatedly rejected claims otherwise. Charging Frakes under Section 37-2732B was likewise constitutional and well within the prosecutor's discretion. Frakes therefore fails to show fundamental error.

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. Id. The appellate court is obligated to seek a construction of a statute that upholds its constitutionality. Id.

C. Frakes's Never-Before-Made Constitutional Claims Are Not Preserved And Any Claim Of Fundamental Error Has Been Waived On Appeal

It is "well established" that Idaho's appellate courts "will not address on appeal" a constitutional "challenge to a defendant's sentence where the trial court was not first given an opportunity to consider the issue." State v. Martin, 119 Idaho 577, 808 P.2d 1322 (Ct. App. 1991) (appellant "failed to raise [a] constitutional argument before the district court, and, accordingly, he cannot now raise it for the first time on appeal"); see also State v. Cortez, 122 Idaho 439, 835 P.2d 674 (Ct. App. 1992); State v. Samora, 131 Idaho 198, 199, 953 P.2d 638, 639 (Ct. App. 1998). This is because "[i]ssues not raised below will not be considered by this court on appeal, and the parties will be held to the theory upon which the case was presented to the lower court." State v. Garcia-Rodriguez, 162 Idaho 271, 275, 396 P.3d 700, 704 (2017) (quoting Heckman Ranches, Inc. v. State, By & Through Dep't of Pub. Lands, 99 Idaho 793, 799-800, 589 P.2d 540, 546-47 (1979)). Thus, in order to raise a constitutional challenge to a sentence for the first time on appeal a defendant would need to show that it "constitute[d] fundamental error." State v. Clontz, 156 Idaho 787, 792, 331 P.3d 529, 534 (Ct. App. 2014)); State v. Drennen, 122 Idaho 1019, 1022-23, 842 P.2d 698, 701-02 (Ct. App. 1992).

Frakes never claimed below that Section 37-2732B is unconstitutional. (See R.) No dismissal motions pressing these constitutional claims were ever filed. (See R.) One can CTRL-F the transcripts in their entirety and see that the word "unconstitutional" was never uttered by defense counsel—much less were the specific arguments raised on appeal, now spanning some 13 pages worth of appellate briefing, ever made below. (See Tr.) Likewise, Frakes never claimed below that the prosecutors' charging decision amounted to a constitutional

violation, much less the series of constitutional violations she now alleges. (See R.; see Tr.) Frakes's constitutional claims are simply unpreserved.

Frakes does not directly address preservation in her briefing. (See Appellant's brief.) However, she appears to conclude these constitutional claims are preserved based on a single, offhand remark made by defense counsel at sentencing:

> Now, your Honor tells my client frequently, over and over again, that they won't get penalized for going to trial, *but in this case Tabatha is being penalized for exercising her constitutional rights.* In this case, because of the mandatory minimum, Tabatha is going to go to prison for at least ten years.

(Tr., p.553, Ls.9-14 (emphasis added).)

Unspecific, generalized grousing about being punished "for exercising … constitutional rights" is insufficient to preserve the smorgasbord of specific constitutional claims that Frakes now debuts on appeal. Indeed, even "stating the name of a case and a general proposition therefrom is not enough to raise every specific theory or principle of law within it." State v. Wolfe, 165 Idaho 338, ___, 445 P.3d 147, 151 (2019) (footnote omitted). It necessarily follows that the bare incantation of "constitutional rights" does not conjure up every constitutional claim under the sun. Nor does a complaint about "being punished for exercising … constitutional rights" preserve a specific claim that a statute *itself* is unconstitutional; or the separate specific claim that those purported punishments *themselves* are rights violations; or any of the other specific Fourth, Fifth, and Sixth Amendment theories and arguments (under *both* state and federal constitutions) that ornament page after page of opening briefing. See Wolfe, 165 Idaho at ___, 445 P.3d at 151 (explaining that "a 'kitchen sink' strategy will not suffice to preserve an issue for appeal and is inherently unfair").

Frakes's constitutional claims are accordingly not preserved. And Frakes would need to argue fundamental error to attack the constitutionality of Section 37-2732B or the state's charging decision for the first time on appeal. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010). She has not done so. (See Appellant's brief.) Because appellants must raise issues in their opening briefing to preserve them, any claim of fundamental error has been waived on appeal. I.A.R. 35(a)(4); Patterson v. State, Dep't of Health & Welfare, 151 Idaho 310, 321, 256 P.3d 718, 729 (2011); The David & Marvel Benton Tr. v. McCarty, 161 Idaho 145, 155, 384 P.3d 392, 402 (2016) ("In order to be considered by this Court, the appellant is required to identify legal issues and provide authorities supporting the arguments in the opening brief."). This Court should reject Frakes's unpreserved constitutional claims on this threshold basis.

D. Alternatively, Frakes Fails To Show Any Fundamental Error Because It Is Well-Settled That Both Idaho Code Section 37-2732B And A Prosecutor's Evidence-Based Charging Decisions Are Constitutional

Even assuming Frakes had alleged fundamental error on appeal any such claim would fail on the merits. To show fundamental error the appellant must first show that "one or more … unwaived constitutional rights were violated." State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010). 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.

Frakes fails to show the first two prongs of Perry have been satisfied here—both with respect to her claim that Section 37-2732B is unconstitutional, and her claim that the prosecutor's charging decision violated her constitutional rights. Under either theory, Frakes fails to show any constitutional violation whatsoever and fails to show any error is clear or obvious.

1. Frakes Cannot Show That Idaho Code Section 37-2732B Is Unconstitutional Or That It Otherwise Violated An Unwaived Constitutional Right, Or That Any Such Errors Plainly Exist

Frakes has failed to show that Idaho Code Section 37-2732B, setting forth the mandatory minimum sentences for drug trafficking, is unconstitutional or otherwise violated her constitutional rights. It is well settled that Section 37-2732B "fully complies" with the Idaho Constitution. See e.g., State v. Puetz, 129 Idaho 842, 844, 934 P.2d 15, 17 (1997). Frakes herself acknowledges, as she must, that the people of the state of Idaho have written fixed sentencing into the state constitution. (Appellant's brief, p.15.) She concedes that by dint of a 1978 amendment the "legislature may encroach on" the judiciary's inherent "sentencing powers by enacting an express mandatory minimum sentence pursuant to Article V, Section 13." (Id.) And she admits that "[t]he current statute no longer provides any means by which the court may reduce the mandatory sentences, thereby seeming to meet the [constitutional requirement] providing that mandatory minimum sentences 'shall not be reduced.'" (Appellant's brief, pp.16-17 (citing Puetz, 129 Idaho at 844, 934 P.2d at 17).)

It is therefore unclear why Frakes concludes that Section 37-2732B "unconstitutionally infringes on the judiciary's inherent authority to suspend a sentence." (Appellant's brief, p.8.) Fixed minimum sentencing is written into Idaho's constitution. Idaho Const. art. V, § 13. And Section 37-2732B does not simply "*seem*[] to meet" the requirements of Art. V, §13, as Frakes

puts it. (See Appellant's brief, p.16 (emphasis added).) The Idaho Supreme Court has already expressly held that Section 37-2732B "fully complies" with the Article V requirements, and is constitutional:

> Further, I.C. § 37–2732B, after the 1995 amendment, *fully complies* with the requirement of art. V, § 13 of the Idaho Constitution that mandatory minimum sentences "shall not be reduced". There currently is no provision in the statute by which the mandatory fixed sentences can be reduced. *Thus, we hold that the current statute is constitutional.*

Puetz, 129 Idaho at 844, 934 P.2d at 17 (emphasis added). The Idaho Court of Appeals has likewise specifically rejected the exact same "inherent authority" arguments that Frakes makes now:

> [Appellant's] reliance on *State v. McCoy* is also misguided. Garcia-Pineda argues *McCoy* stands for the principle that the judiciary has an inherent power under the common law to suspend the whole or part of a defendant's sentence. The decision in *McCoy* predated the amendment to Article V, Section 13 of the Idaho Constitution, which states, in relevant part: "any sentence imposed shall be not less than the mandatory minimum sentence so provided. Any mandatory minimum sentence so imposed shall not be reduced." Therefore, the *McCoy* decision, and its reliance on the common law, is inapplicable to the current case.

State v. Garcia-Pineda, 154 Idaho 482, 485, 299 P.3d 794, 797Ct. App. 2013) (internal citations omitted, footnote omitted); see also State v. Thiel, 158 Idaho 103, 111, 343 P.3d 1110, 1118 (2015) ("In response to the Court's holding in *McCoy*, the legislature proposed and the people adopted an amendment to Article V, Section 13 of the Idaho Constitution. Idaho Const. art. V, § 13. This amendment granted the legislature the constitutional authority to enact mandatory minimum sentences. After the amendment to Article V, Section 13, it was no longer unconstitutional for the legislature to issue a mandatory minimum sentence infringing upon the judiciary's inherent, common law authority to exercise its discretion to suspend a sentence.");

State v. Pena-Reyes, 131 Idaho 656, 657, 962 P.2d 1040, 1041 (1997); State v. Rogerson, 132 Idaho 53, 56, 966 P.2d 53, 56 (Ct. App. 1998).

Frakes argues that Section 37–2732B was unconstitutionally applied here as a result of the prosecutor's choice to charge her with trafficking more weight than her co-conspirators. As Frakes puts it, "the prosecutor did not charge the Lopezes with a different offense and, instead, alleged that the amount the trafficked was less than the quantity of meth than they actually possessed in exchange for the Lopezes' assistance prosecuting Tabatha." (Appellant's brief, p.17.) Frakes's core complaint is that charging discretion removed the statute from the "narrow limitation on the judiciary's inherent authority to sentence" found in Idaho's Constitution: "[t]he prosecutor's authority to charge a lower quantity based on substantial assistance, thereby authorizing the judge to sentence to a lower mandatory minimum, is indistinguishable from the prosecutor's authority under the prior trafficking statute, which also authorized the judge to sentence under the mandatory minimum based on substantial assistance." (Appellant's brief, p.18.)

Here too, Frakes fails to show any constitutional violation whatsoever, because the Idaho Supreme Court has already squarely addressed this claim and found it meritless:

> On appeal, [appellant] argues that I.C. § 37-2732B remains unconstitutional because the prosecutor still controls the sentences in these cases in that the prosecutor, by deciding to reduce a charge, can reduce the mandatory fixed term. This argument is without merit. *Prosecutors have always had the authority to reduce the charges against a particular suspect, and in deciding whether to charge a suspect at all.*

State v. Puetz, 129 Idaho 842, 844, 934 P.2d 15, 17 (1997) Thus, the decision to charge Frakes with possession of 400 grams of methamphetamine was well within this "wide range of discretion," and was likewise constitutional. Id.

Lastly, Idaho's appellate courts have repeatedly rejected the other flavors of constitutional argument Frakes presses on appeal. Pena-Reyes, 131 Idaho at 656-57, 962 P.2d at 1040-41 (holding the trafficking statute "does not violate Article 5, Section 13, of the Idaho Constitution"); State v. Payan, 132 Idaho 614, 616-18, 977 P.2d 228, 230-32 (Ct. App. 1998) (holding the appellant "failed to establish that his prosecution under I.C. § 37-2732B violated the Equal Protection Clause of the United States Constitution or the equal protection provision of the Idaho Constitution"). In particular, the Rogerson Court held that the trafficking statute does not violate separation of powers, does not violate due process, and does not violate the equal protection clause. 132 Idaho at 55-57, 966 P.3d at 55-57. In sum, Frakes fails to show that Section 37-2732B is unconstitutional or that it violated any of her constitutional rights.

The second prong of the Perry fundamental error test requires Frakes to show the alleged error plainly exists. 150 Idaho at 228, 245 P.3d at 980. Demonstrating an error plainly exists "necessitates a showing by the appellant that existing authorities have *unequivocally* resolved the issue in the appellant's favor." State v. Hadden, 152 Idaho 371, 375, 271 P.3d 1227, 1231 (Ct. App. 2012) (emphasis in original). It also requires a showing that the error is clear as a factual matter, "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." Perry, 150 Idaho at 228, 245 P.3d at 980; State v. Miller, 165 Idaho 115, 119, 443 P.3d 129, 133 (2019) (clarifying "that whether trial counsel made a tactical decision in failing to object is a claim that must be supported by evidence in the record").

Frakes cannot show the alleged error plainly exists because she cannot show existing authorities have unequivocally resolved the issue in her favor. As explained above, Idaho's appellate courts have repeatedly affirmed that Section 37-2732B is constitutional and repeatedly

rejected the same arguments Frakes now presses on appeal. Moreover, controlling authority aside, Frakes does not point to any *evidence* showing "whether trial counsel made a tactical decision in failing to object" to the constitutionality of the statute, nor is there any such evidence. Miller, 165 Idaho 115, 119, 443 P.3d 129, 133. Thus, this claim is "factual in nature and thus more appropriately addressed via a petition for post-conviction relief." Id.; State v. Saenz, No. 46262, 2020 WL 1148807, at *5 (Ct. App. Mar. 10, 2020) ("Like claims of ineffective assistance of counsel, establishing prong two of the Perry standard will necessarily involve inquiring into the behavior and motivations of trial counsel. These inquiries will usually require factual development of the record, and thus, like post-conviction claims, are not suited to direct review.") Because Frakes fails to show any clear or obvious error, she fails to show fundamental error with respect to her claim that Section 37-2732B is unconstitutional.

2. Frakes Cannot Show That The Prosecutor's Charging Decision Violated An Unwaived Constitutional Right, Or That Any Such Error Plainly Exists

Turning to Frakes's other constitutional claim, Frakes argues that "the state's charging decision in the consolidated cases violated her rights to equal protection and due process under the Idaho and federal constitution and impermissibly infringed on her privilege against self-incrimination and her constitutional rights to trial." (Appellant's brief, p.18 (emphasis altered).) Frakes again takes issue with the prosecutor's choice to charge Frakes with trafficking "the actual weight of the meth" while charging her cooperating co-conspirators with trafficking "a lower quantity." (Appellant's brief, p.25.) Per Frakes, this was an abuse of prosecutorial discretion, insofar as it "was inversely related to the parties' respective culpability." (Appellant's brief, pp.19, 25.) Frakes further argues this amounted to a constitutional violation because "[r]ather than being motivated by the large quantity of drugs, the state's decision in this case was

motivated by Tabatha's decision to exercise her rights to remain silent and require the state to prove her guilt." (Appellant's brief, p.25.)

Frakes is mistaken in several respects. First, [w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." United States v. Batchelder, 442 U.S. 114, 124 (1979); Payan, 132 Idaho at 617, 977 P.2d at 231. Moreover, "prosecutors necessarily must choose between statutes with varying sentencing schemes each time a defendant's actions satisfy the elements of more than one." Payan, 132 Idaho at 617, 977 P.2d at 231; Batchelder, 442 U.S. at 125. "Choosing to charge under one or the other based upon the possible sentence is not in and of itself a violation of equal protection." Payan, 132 Idaho at 617, 977 P.2d at 231. A defendant must therefore "show more than an exercise of that discretion" to establish an equal protection violation:

> The United States Supreme Court and Idaho Supreme Court are in perfect accord in their requirement that, in order to establish an instance of discriminatory application of the law such that equal protection standards have been violated, *there must first be shown a deliberate plan of discrimination based on some unjustifiable classification, such as race, sex, religion, etc.*

Id. (emphasis added, quoting State v. Edmonson, 113 Idaho 230, 235, 743 P.2d 459, 464 (1987)); see also Oyler v. Boles, 368 U.S. 448, 456 (1962).

Frakes does not show any due process or equal protection violation because she fails to show that the prosecutor's charging decision was "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." Oyler, 368 U.S. at 456. Nor does the record remotely show that the state's decision to charge Frakes with trafficking more than 400 grams of meth was "motivated by [Frakes's] decision to exercise her rights to remain silent and to prove her guilt," as Frakes now alleges. (Appellant's brief, p.21.) To the contrary, from the very beginning of this case—long *before* Frakes entered her not guilty plea—Frakes and her co-

conspirators were charged with trafficking 400 grams of methamphetamine. (R., pp.32, 35.) The evidence supported these charges. (See, e.g., Tr., p.389, Ls.16-22.) The record therefore demonstrates that the trafficking charging decision was motivated simply by "the large quantity of drugs" that Frakes and her confederates were transporting. Payan, 132 Idaho at 618, 977 P.2d at 232 (finding no equal protection violation where appellant failed to show "the state's choice was motivated by any factor other than the large quantity of drugs he was convicted of distributing").

Second, while the charges against the Lopezes were reduced because they accepted a plea agreement, this does not mean that the state violated Frakes's constitutional rights by not unilaterally reducing Frakes's charges because it had reduced her co-defendant's charges. "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (footnote omitted). And "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." Oyler, 368 U.S. at 456.

Here, the prosecutor acted well within her discretion when she reduced the Lopezes' charges but not Frakes's charge. Why? Because the Lopezes entered into a plea agreement in exchange for the reduced charge. (Tr., p.270, Ls.4-10.) Frakes, who rejected such a deal, did not get a reduction. (Tr., p.549, Ls.1-10.) It is well established that "openly present[ing] the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, [does] not violate the Due Process Clause of the Fourteenth Amendment." Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978); State v. Rodriquez-Perez, 129 Idaho 29, 33, 921 P.2d 206, 210 (Ct. App. 1996) (finding appellant's "due process rights under

the Fourteenth Amendment were not infringed when the prosecutor carried out his threat to indict Rodriquez-Perez for trafficking in heroin after Rodriquez-Perez refused to plead guilty to the delivery charge").

And this is why the prosecutor—who understood and acknowledged that Frakes played a smaller role in the conspiracy—explained that Frakes's determination to go to trial nevertheless meant she would not receive a reduced charge:

> I indicated to your Honor earlier today that it has always been something that I have considered that [Frakes] is less culpable that the Lopezes, and so I struggled with their ability to get the five-year mandatory minimum where she, if convicted, had the ten year on two different counts. *But despite efforts to resolve the case, the defendant stuck with her story that she wasn't involved and she didn't know anything about anything, which is her right.*
>
> But here we are. The jury convicted her.

(Tr., p.549, Ls.1-10 (emphasis added).)

This was entirely proper. Frakes cannot have her cake and eat it too by insisting on a trial but expecting the state to charge her as if she had accepted a plea deal. Much less can she show a constitutional violation by pointing out that those who took the deal received some consideration for their bargain. In the end, Frakes fails to show that this was anything other than a routine trial following a failed attempted at a plea bargain—much less does she show any constitutional violation.

Finally, Frakes fails to meet her burden to show Perry's second prong with respect to the state's charging decision. Frakes has not demonstrated that Idaho authorities have unequivocally resolved this claim in her favor; as shown above, all the authorities go against her position. Nor does she point to any evidence showing counsel's failure to object to the state's charging decision on constitutional grounds was not tactical. Even assuming there was any error Frakes

fails to show it was plain or obvious, and therefore fails to meet her burden under Perry to show fundamental error. 150 Idaho at 228, 245 P.3d at 980; Miller, 165 Idaho at 119, 443 P.3d at133.

II.
The Jury Verdict Was Supported With Substantial, Competent Evidence That Frakes Trafficked Methamphetamine

Idaho's appellate courts "will not overturn a judgment of conviction, entered upon a jury verdict, where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt." State v. Oliver, 144 Idaho 722, 724, 170 P.3d 387, 389 (2007) (citing State v. Sheahan, 139 Idaho 267, 77 P.3d 956 (2003)). Reviewing courts therefore view evidence "in the light most favorable to the prosecution, and we do not substitute our judgment for that of the jury regarding the credibility of the witnesses, the weight of the evidence, and the reasonable inferences to be drawn from the evidence." Oliver, 144 Idaho at 724, 170 P.3d at 387; State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). The facts, and inferences to be drawn from those facts, are therefore construed in favor of upholding the jury's verdict. See Oliver, 144 Idaho at 724, 170 P.3d at 387; see also Hart, 112 Idaho at 761, 735 P.2d at 1072. Consequently, "[w]here there is competent although conflicting evidence to sustain the verdict, this court cannot reweigh that evidence or disturb the verdict." State v. Merwin, 131 Idaho 642, 644-45, 962 P.2d 1026, 1028-29 (2002); State v. Hoyle, 140 Idaho 679, 684, 99 P.3d 1069, 1074 (2004).

Frakes contends that there is insufficient evidence to support the trafficking charge because the state failed to prove that Frakes "had the power and intent to control the methamphetamine" that police found in the duffel bag. (Appellant's brief, p.22.) She argues that

the evidence shows Frakes merely "*knew* [Douglas Lopez] had a large quantity" of methamphetamine in the duffel bag, but conversely, "had the power and intent to control smaller quantities" that were strewn elsewhere in the vehicle. (Appellant's brief, pp.22-23 (emphasis added).) Frakes borrows an appetizing analogy from the produce aisle to explain why she thinks this matters:

> [T]he methamphetamine for personal use, although taken from the larger quantity, is distinct from the bulk hidden within Doug's backpack[1]. By analogy, consider a scenario where Tabatha helped the Lopezes drive to California to obtain several crates of avocados for sale at the Lopezes' produce market. Then suppose that Doug used one of those avocados to make guacamole for everyone to eat with chips on the ride home.
>
> That Tabatha possessed the bowl of guacamole would not give her dominion or control over the avocados in the crates, despite the fact she knew they were there and had agreed to help drive so Doug could purchase those avocados.

(Appellant's brief, p.24.) Frakes concludes that "[e]vidence that Tabatha knew of the meth in Doug's backpack and possessed smaller quantities set aside for consumption in the paraphernalia is legally insufficient to establish that Tabatha knowingly possessed the bulk methamphetamine stashed in Doug's duffle bag," and that, therefore, "her [judgment] of conviction must be vacated." (Appellant's brief, pp.24-25.)

This take on the evidence is fundamentally mistaken because it only contends with a portion of the charging language. Whether Frakes "had the power or intent to control the methamphetamine" goes to a single element: constructive possession. See Rogerson, 132 Idaho 53, 58, 966 P.2d 53, 58 (Ct. App. 1998) (explaining that proof a defendant "had the power and intent to exercise dominion and control over the substance" is "required to demonstrate in order

[1] The state presumes that the occasional references in the Appellant's brief to "Doug's backpack" are intended to refer to the duffel bag.

to prove that a defendant had constructive possession of a controlled substance"). But Frakes was not charged with trafficking methamphetamine by possession alone. As the state's information makes clear, Frakes was charged with a series of disjunctive acts—the state alleged that either Frakes knowingly possessed the methamphetamine *or* she brought it to the state of Idaho:

> TABATHA RANA FRAKES, on or about the 13th day of June 2018, in the County of Ada, State of Idaho, *did bring to this state and/or* knowingly possess four hundred (400) grams or more of Methamphetamine, a Schedule II controlled substance, or of any mixture or substance containing a detectable amount of Methamphetamine.

(R., p.32 (emphasis added).) The jury instructions likewise plainly state that Frakes could have been convicted based on a theory that she knowingly possessed methamphetamine *or* a theory that she brought it into the state:

INSTRUCTION NO. 14

> In order for the defendant, Tabatha Rana Frakes aka Zapata, to be guilty of Trafficking in Methamphetamine, the State must prove each of the following:
>
> ...
>
> 3. the defendant, Tabatha Rana Frakes aka Zapata, *did bring into the state of Idaho and/or* knowingly possess methamphetamine....

(R., p.105 (emphasis added).)

At minimum, the state *either* needed to prove Frakes knowingly possessed the methamphetamine or, alternatively, that she merely brought it into the state. And whether Frakes had the "power and intent to control" the methamphetamine only goes to the possession element—not the bring-into-the-state element. See Rogerson, 132 Idaho at 58, 966 P.2d at 58.

Thus, whether there was any evidence[2] that Frakes constructively possessed the methamphetamine makes no difference—because there was plenty of evidence to sustain the jury verdict on the alternate theory that Frakes "did bring [methamphetamine] into the state of Idaho." (R., p.32.) Frakes was arrested in Idaho driving a van filled with methamphetamine purchased in California. (Tr., p.184, Ls.10-17; p.323, Ls.13-15; p.325, Ls.6-8; p.389, Ls.16-22.) The Lopezes testified Frakes knew they were transporting methamphetamine. (Tr., p.278, L.15 – p.279, L.13; p.321, Ls.2-12.) Frakes agrees that the Lopezes "testified that they asked Tabatha to help drive on the two trips to California and that she knew the purpose of the trips was for the Lopezes to purchase a quantity of meth." (Appellant's brief, p.12.) And even Frakes now concedes "her role truly was limited to helping drive the vehicle" and alludes to the "[e]vidence that Tabatha knew of the meth" in the duffel bag. (Appellant's brief, p.24.) This is precisely the evidence proving Frakes trafficked methamphetamine by bringing it into the state—and it shows this *regardless* of whether Frakes possessed the methamphetamine, constructively or otherwise.

[2] Moreover, even if the state was required to prove Frakes "had the power and intent to control the methamphetamine" in the duffel bag to sustain the conviction, the state's evidence comfortably proved this as well. Frakes was driving the van when it was pulled over, and the driver of a vehicle has obvious power over items found within it. C.f. State v. Ebokosia, No. 46176, 2019 WL 3492493, at *3 (Idaho Ct. App. Aug. 1, 2019) (concluding that even a *passenger* of a vehicle had control over marijuana in the trunk, in part because "a reasonable jury could conclude that in the course of a 1,855 mile trip, the parties would share the driving responsibilities, particularly where the vehicle was not owned or rented by either party"). Moreover, Athena Lopez testified that all three of them "moved about" the van during the June 13 trip, further showing Frakes's ability to control the duffel bag. (Tr., p.304, Ls.2-10.) As to whether Frakes knew of the methamphetamine in the duffel bag, the state adduced ample evidence that she did, including Athena Lopez's testimony that Frakes was "in the hotel room in California when the source delivered" the methamphetamine, the delivery was not secretive, and they "all knew" about it. (Tr., p.297, L.20 – p.298, L.22.) Likewise, Douglas Lopez testified that he believed Frakes was "in the room" when he received, unwrapped, and weighed the methamphetamine that the source had just delivered. (Tr., p.333, L.1 – p.334, L.12.)

So Frakes's avocado analogy is toast. While Frakes implores she is akin to a driver who merely "knew [avocado crates] were there and had agreed to help drive" (Appellant's brief, p.24), any reasonable juror would conclude a truck driver, who knows his truck is stuffed with California avocados, who agrees to transport the avocados across state lines for money, is *bringing them into the state*. Replace the avocados with methamphetamine and you have more than enough evidence to support a trafficking verdict. Any argument otherwise is wholly guacamole.

Substantial and competent evidence supported the trafficking verdict. Frakes fails to show[3] otherwise.

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[3] Frakes tacks on an additional argument that insufficient evidence supported the verdict on constitutional grounds. (Appellant's brief, pp.25-27.) She claims that "the agreement underlying the conspiracy to traffic was the means by which Tabatha aided and abetted the Lopezes' possession and transportation of the two pounds and Tabatha's trafficking conviction cannot be sustained on an aiding and abetting theory without violating double jeopardy." (Appellant's brief, pp.26-27.) Much like Frakes's other constitutional claims on appeal this is not preserved; even squinting at the record, one cannot find anything resembling a double jeopardy claim within it. (See R.; see Tr.) Frakes likewise fails to mention fundamental error, which she must to raise this newfound claim on appeal. (See Appellant's brief, pp.25-27.) In any event, this argument fails on the merits for the very reasons Frakes herself sets forth in her briefing. Frakes acknowledges that, "[g]enerally, a conviction and sentence on a count charging conspiracy will not, on the theory of double punishment, prevent conviction and sentence on another count charging the substantive offense." (Appellant's brief, p.26 (citing Iannelli v. United States, 420 U.S. 770, 777 (1975); State v. Sanchez-Castro, 157 Idaho 647, 648, 339 P.3d 372, 373 (2014); State v. Gallatin, 106 Idaho 564, 567, 682 P.2d 105, 108 (Ct. App. 1984)).) Frakes's general rule squelches her claim—the state did not doubly punish Frakes by alleging a conspiracy to commit, among other things, the acts in the substantive offense of trafficking.

CONCLUSION

The state respectfully requests this Court affirm Frakes's judgment of conviction and sentences.

DATED this 1st day of May, 2020.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 1st day of May, 2020, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

ROBYN FYFFE
FYFFE LAW, LLC
robyn@fyffelaw.com

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd