

6-13-2017

## State v. Kerr Appellant's Brief Dckt. 44770

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

*Plaintiff-Respondent,*

vs.

RICHARD TURNER KERR,

*Defendant-Appellant.*

SUPREME COURT NO. 44770

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APPELLANT'S BRIEF

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

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HONORABLE, John T. Mitchell  
District Judge, Presiding

---

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## STATEMENT OF THE CASE

### Nature of the Case

This is an appeal from a judgment of conviction and sentence for grand theft by possession of stolen property, I.C. §§ 18-2403(4) and 18-2407(1). On appeal, Appellant, Richard Turner Kerr alleges the district court improperly questioned him in violation of his federal constitutional right against compulsory self-incrimination and, resultantly, he was denied the opportunity to engage in the retained jurisdiction program.

### Statement of Facts and Course of Proceedings

On June 1, 2016, Appellant, Richard Turner Kerr (hereinafter “Kerr”) was seen driving a reported stolen vehicle in the area of Highway 95 and I-90 in Coeur d’Alene. (R., p. 11; Presentence Report (PSI), p. 3.) Upon contact and questioning by law enforcement Kerr stated that he purchased the vehicle a couple days earlier from a male for \$300.00. (*Id.*) Kerr further admitted to law enforcement that, upon purchasing the vehicle, he drove it to Spokane, Washington where he stole license plates from a similar vehicle and placed them on the stolen vehicle. (*Id.*) Kerr was subsequently charged with grand theft by possession of stolen property in violation of I.C. § 18-2403(4). (R., pp. 19-20, 80-81.)

Pursuant to a plea agreement Kerr pled guilty to the charge of grand theft by possession of stolen property. (R., pp. 82-83.) In exchange for his guilty plea, the state agreed to dismiss a persistent violator enhancement allegation and to recommend at sentencing Kerr be sentenced to a retained jurisdiction. (R., p. 83.) Pursuant to the plea agreement both the state and Kerr would

be free to make any recommendation they deemed appropriate as to the underlying sentence for the offense. (*Id.*)

At the sentencing hearing, defense counsel brought errors in the presentence investigation report (PSI) to the attention of the district court and requested corrections to the report. (Transcript, p. 4, L. 4 – p. 7, L. 16.) The court then heard the victim’s impact statement, counsels’ sentencing recommendations and a statement from Kerr. (Transcript, p. 7, L. 22 – p. 10, L. 7 (witness statement); p. 10, L. 21 – p. 14, L. 21 (counsels’ recommendations); and, p. 15, L. 1 – p. 16, L. 8 (defendant’s statement).) Following Kerr’s statement, the district court announced the underlying sentence for Kerr’s conviction for grand theft by possession of stolen property of a five-year fixed followed by an indeterminate nine-year sentence. (Transcript, p. 16 Ls. 10-17.)

Immediately thereafter, the following exchange took place between the district court and Kerr:

THE COURT: So I’m going to give you one chance and one chance only to be honest, and you’ll either tell me who you bought [the vehicle] from or you won’t. If you tell me who you bought it from, I will consider a retained jurisdiction. I’m not overly thrilled about a retained jurisdiction given your criminal history, *but I won’t consider a retained jurisdiction unless you’re honest who you got it from.* (Emphasis added.)

KERR: Honestly, I don’t know, your Honor.

THE COURT: Then you lied in your pre-sentence report where it says on page 4, “Mr. Kerr admitted he knows the individual’s name but prefers not to say.”

KERR: I –

THE COURT: So, I am imposing that prison sentence and remanding you to the custody of the Idaho State Board of Correction today, and giving you credit for 182 days time served on that sentence.

(Transcript, p. 16, L. 18 – p. 17, L. 10.)

At no time did Kerr or his counsel object to the district court's questioning of Kerr as to the identity of the person from whom he purchased the vehicle. (*See, generally*, R., pp. 16-17.)

Kerr timely appealed from the district court's imposition his sentence. (R., pp. 93-96.) Kerr now makes the following argument that his sentence should be vacated and this matter remanded for resentencing.

### ISSUES PRESENTED

1. Did the district court's questioning of Kerr in violation of Kerr's Fifth Amendment right against compulsory self-incrimination constitute fundamental error such that the issue may be addressed on appeal despite the lack of a timely objection before the trial court?
2. Did the district court violate Kerr's Fifth Amendment rights by refusing to consider sentencing Kerr to a retained jurisdiction unless Kerr identified the person from whom he purchased the stolen vehicle?

## ARGUMENT

### I. THE DISTRICT COURT'S VIOLATION OF KERR'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT IS REVIEWABLE UNDER THE FUNDAMENTAL ERROR DOCTRINE.

#### A. Introduction

At Kerr's sentencing hearing, there was no contemporaneous defense objection to the district court's questioning of Kerr as to the identity of the seller of the stolen vehicle. Generally, this would preclude the issue from being considered before this appellate court. Issues not raised below generally may not be considered for the first time on appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). For an objection to be preserved for appellate review, either the specific ground for the objection must be clearly stated or the basis of the objection must be apparent from the context. *State v. Sheahan*, 139 Idaho 267, 277, 77 P.3d 956, 966 (2003).

Idaho decisional law, however, has long allowed appellate courts to consider a claim of error to which no objection was made below if the issue presented rises to the level of fundamental error. *See, State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007); *State v. Haggard*, 94 Idaho 249, 251, 486 P.2d 260, 262 (1971). Also, in *State v. Perry*, 150 Idaho 209, 245 P.3d 961 (2010) the Idaho Supreme Court abandoned the definitions it had previously utilized to describe what may constitute fundamental error. In *Perry*, the Court held that in cases of unobjected-to fundamental error: (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated; (2) the error must be clear or obvious without the need for any additional information not contained in the appellate record, including

information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate the error affected the defendant's substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings. *Id.* at 226, 245 P. 3d at 978. While the decision in *Perry* involved unobjected-to fundamental error at trial, the *Perry* test applies to unobjected-to error occurring also at sentencing.

II. THE DISTRICT COURT VIOLATED KERR'S FIFTH AMENDMENT RIGHTS BY PREDICATING ANY CHANCE OF KERR RECEIVING A RETAINED JURISDICTION ON THE REQUIREMENT KERR WAIVE HIS RIGHT TO REMAIN SILENT AND IDENTIFY THE SELLER OF THE STOLEN VEHICLE.

Applying the test pronounced in *Perry*, it is clear the district court's questioning of Kerr as to the identity of the seller of the stolen vehicle was fundamental error that necessitates vacating Kerr's sentence.

First, the district court's questioning of Kerr about the identity of the seller involved compelling Kerr to waive his Fifth Amendment right to be free from compulsory self-incrimination as to uncharged criminal conduct that was not before the district court.

The Fifth Amendment to the United States Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself." A defendant does not lose this protection by reason of his conviction for a crime. *State v. Van Komen*, \_\_\_ Idaho \_\_\_, 376 P.3d 738, 742 (2016) (citing, *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S.Ct. 1136 (1984)). The protection also applies to prohibit compelling a defendant to testify against his will at sentencing. *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866 (1981).

While a defendant may waive his right to remain silent at sentencing by pleading guilty to a criminal offense, that waiver extends only “to permit the trial court to interrogate [him] to determine the voluntariness of [his] plea and to establish a factual basis for accepting it.” *State v. Wilkins*, 125 Idaho 215, 217-18, 868 P.2d 1231, 1233-34 (1994). This limited waiver precludes a district court compelling a defendant to testify about matters extending beyond the facts of the offense to which he pleads guilty. *State v. Heffern*, 130 Idaho 946, 948, 950 P.2d 1285, 1287 (Ct. App. 1997).

In Kerr’s case, the charge to which he plead guilty of grand theft by possession of stolen property contained no elements which necessitated the district court inquiring of the identity of the seller. *See*, I.C. § 18-2403(4). Therefore, the district court’s demand as to the identity of the seller was not necessary for the court to determine the voluntariness of Kerr’s guilty plea or the court’s factual basis for accepting that plea. Moreover, the plea agreement Kerr entered with the state provided him no protection from possible further criminal prosecution for any other offenses related to the stolen vehicle, let alone an offense where the identity of a co-defendant might be required. *See*, R., pp. 82-83. Had Kerr responded to the district court as to the identity of the seller, he would have subjected himself to further potential criminal liability. For example, Kerr and his newly identified co-defendant could have been charged with conspiracy to transfer a stolen vehicle in violation of I.C. §§ 49-228 and 18-1701. *See*, I.C. §§ 49-228 and 18-1701. Even at his sentencing hearing Kerr retained the right to remain silent as to his knowledge of the identity of the seller and the district court’s questioning of Kerr in that regard, violated Kerr’s Fifth Amendment rights.

Under the second prong of test set forth in *Perry*, there can be little argument that the district court's conduct in violating Kerr's constitutional right to remain silent is clear and obvious from the record. At sentencing, the district court stated: "...I won't consider a retained jurisdiction unless your honest who you got it from." (Transcript, p. 16, Ls. 23-25.) By making this statement, the district court unambiguously was informing Kerr that he was going to be sentenced to prison, unless Kerr waived his right to remain silent and provided the identity of the seller. By making this statement, the district court was unambiguously laying the trap for Kerr that he was either going to waive his right to remain silent and identify the the seller (and face possible further prosecution) or suffer the predetermined and pre-announced consequence of going to prison with no opportunity to engage in the retained jurisdiction program. Based upon the record, no additional information from other sources is necessary to illuminate the district court's error.

Finally, there can be little, if any, doubt that a reasonable possibility exists that the district court's error affected the outcome of Kerr's sentencing. At sentencing the district court had a lot of information available to it. That information came in the form of the PSI report, the victim's statement, the recommendations of counsel, and Kerr's statement. For instance, there was information in the record that Kerr was relatively young (age 23); had never fully participated in a "rider" before; and the state, defense counsel and the presentence investigator were recommending the court imposed a retained jurisdiction. On the other hand, there was also information that Kerr had a significant criminal history and had very recently violated his parole; factors which would militate in favor of imposing a prison sentence. With this information, the

district court could have deliberated and imposed a reasonable sentence. However, the record does not indicate the district court used this information in fashioning Kerr's sentence, including whether to retain jurisdiction or simply impose a prison term.

The Idaho Supreme Court has long recognized the four objectives of criminal punishment include: (1) protection of society, deterrence of the individual and the public generally, (3) the possibility of rehabilitation, and (4) punishment or retribution for wrongdoing. *See, State v. Wolfe*, 99 Idaho 382, 384 582 P.2d 728, 730 (1978); *see, also, State v. Toohill*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982). In addition, the Idaho Legislature has set forth criteria for courts to consider in deciding whether to place a defendant on probation or impose a sentence of imprisonment. *See*, I.C. § 19-2521.

The record in Kerr's case hardly indicates the district court considered the factors in *Wolfe, supra* and *Toohill, supra* or the statutory criteria in § 19-2521 in fashioning Kerr's sentence. At sentencing, while the court acknowledged Kerr had a criminal history, (Transcript, p. 16, Ls. 22-23.), the court also stated: "I won't consider a retained jurisdiction unless you're honest about who you got it from." (Transcript, p. 16, Ls. 23-25.) This statement constituted a promise by the district court that it would impose Kerr's prison sentence, without the opportunity for a retained jurisdiction, if Kerr failed to reveal the identity of the person from whom he purchased the stolen vehicle. When Kerr failed to provide the name, the court kept its promise and imposed Kerr's sentence. On this record, little doubt exists that the district court's error affected the outcome of Kerr's sentencing.

### CONCLUSION

Based upon the forgoing arguments, Appellant, Richard Turner Kerr respectfully submits that the district court's questioning of Kerr at sentencing constitutes fundamental error that necessitates vacating Kerr's sentence and remanding this matter for resentencing.

Dated this 13<sup>th</sup> day of June, 2017.

A handwritten signature in dark ink, appearing to read 'D. G. Cooper', with a long horizontal line extending to the right.

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DANIEL G. COOPER  
Conflict Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have on this 13<sup>th</sup> day of JUNE, I served a true and correct copy of the forgoing by the method indicated below, addressed to:

Lawrence G. Wasden  
Attorney General, State of Idaho  
P.O. Box 83720  
Boise, ID 83720-0010

☒ By email to: [ecf@ag.idaho.gov](mailto:ecf@ag.idaho.gov)



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DANIEL G. COOPER