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State v. Kerr Respondent's Brief Dckt. 44770

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	No. 44770
Plaintiff-Respondent,)	
)	Kootenai County Case No.
v.)	CR-2016-10503
)	
RICHARD TURNER KERR,)	
)	
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

Richard Turner Kerr appeals from his judgment of conviction and sentence for grand theft by possession of stolen property.

Statement Of The Facts And Course Of The Proceedings

Kerr was found driving a reported stolen vehicle and was charged with grand theft by possession of stolen property. (PSI, p. 3; R., pp. 80-81, 84-85.) He pleaded guilty to the grand theft charge pursuant to a plea agreement with the state. (R., pp. 82-83.)

In his presentence investigation report (“PSI”), Kerr told the investigator the following:

During the interview, Mr. Kerr indicated some “random” person that he did not know sold him the vehicle. He indicated he was just walking down the street and started hanging out with this person. Mr. Kerr admitted he knows the individual[’]s name but prefers not to say.

(PSI, p. 4.)

At sentencing, the victim of the theft made a statement, and the state recommended a retained jurisdiction. (Tr., p. 8, L. 7 – p. 12, L. 10.) Kerr’s counsel also recommended a rider, and corrected the PSI, noting that while it stated Kerr had five adult felony convictions, it should have stated that Kerr had two adult felony convictions (including the instant offense). (Tr., p. 4, Ls. 4-9; p. 14, Ls. 9-21.) Kerr’s counsel did not challenge the remainder of the PSI’s criminal history, which showed 13 adult misdemeanor convictions, 2 juvenile felony convictions, 17 juvenile misdemeanor convictions, and one adult conviction with unknown severity. (See Tr., p. 4, Ls. 11-20;

PSI, pp. 4-10.) Kerr's counsel noted that "I have never seen a client as young as Mr. Kerr that has spent as much time in custody as he has." (Tr., p. 13, Ls. 14-16.)

At the conclusion of sentencing the district court and Kerr had the following exchange:

THE COURT: All right. Here is the sentence that I'm handing down for the felony crime theft by receiving, possessing or disposing of stolen property for events that occurred June 1st, 2016. The sentence is to the custody of the Idaho State Board of Correction for a fixed five-year sentence followed by an indeterminate nine-year sentence, total sentence not to exceed fourteen years.

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 this 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 about who you got it from.

THE DEFENDANT: 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."

THE DEFENDANT: 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 give you credit for 182 days time served on that sentence.

(Tr., p. 16, L. 10 – p. 17, L. 10.) The district court entered a judgment of conviction imposing Kerr's sentence. (R., pp. 89-91.)

Kerr timely appealed. (R., pp. 93-96.)

ISSUES

Kerr states the issues on appeal as:

- I. 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?
- II. 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?

(Appellant's brief, p. 4)

The state rephrases the issue as:

Has Kerr failed to show the district court committed fundamental error by imposing his sentence?

ARGUMENT

Kerr Has Failed To Show The District Court Committed Fundamental Error By Imposing His Sentence

A. Introduction

Kerr admitted in his PSI that he knew, but did not want to reveal, the name of the person he bought the stolen vehicle from. (PSI, p. 4.) At sentencing, the district court asked Kerr to “tell me who you bought this from”; when Kerr stated “Honestly I don’t know,” the court imposed Kerr’s sentence, finding that “you lied in your pre-sentence report.” (Tr., p. 16, L. 18 – p. 17, L. 10.)

Kerr did not object below and therefore must show the district court committed fundamental error by imposing Kerr’s sentence as opposed to retaining jurisdiction. Because Kerr fails to show that the district court clearly violated his constitutional rights by imposing his sentence, and fails to show that any alleged error affected his substantial rights, he cannot show fundamental error.

B. Standard Of Review

“[C]onstitutional issues are pure questions of law over which this Court exercises free review.” Murray v. State, 156 Idaho 159, 164, 321 P.3d 709, 714 (2014). However, “[i]t is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal.” State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Idaho’s appellate courts review unpreserved claims of error for fundamental error. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010).

C. The District Court Did Not Commit Fundamental Error By Imposing Kerr's Sentence

Kerr concedes that because he did not object to his sentence imposition below he must therefore show fundamental error on appeal. (Appellant's brief, pp. 3, 5-6.) In order to do so he must show that the error: "(1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (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) was not harmless." Perry, 150 Idaho at 228, 245 P.3d at 980. He cannot do so here.

1. Kerr Has Failed To Show That, In Light Of His Admission To Knowing An Individual Connected To This Offense, That The District Court's Request For That Individual's Name Would Clearly Violate Kerr's Unwaived Fifth Amendment Rights

A criminal defendant's Fifth Amendment right against compelled self-incrimination extends to sentencing. See Estelle v. Smith, 451 U.S. 454, 463 (1981) ("Any effort by the State to compel [a defendant] to testify against his will at the sentencing hearing clearly would contravene the Fifth Amendment."). While a guilty plea will waive a defendant's constitutional protections with respect to the "offenses to which the defendant pleads guilty," it is "not to be construed 'as being a blanket waiver with respect to other offenses that might be charged'" at a later time. State v. Jones, 129 Idaho 471, 475-76, 926 P.2d 1318, 1322-23 (Ct. App. 1996). The Idaho Supreme Court has therefore held that where a district court "relinquished jurisdiction solely because Defendant refused to waive his Fifth Amendment right and answer questions that could incriminate him and result in new felony charges," that the court violated the defendant's Fifth Amendment rights. State v. Komen, 160 Idaho 534, 540, 376 P.3d 738, 744 (2016).

However, this does not mean that sentencing courts are prohibited from drawing any adverse inferences whatsoever from a defendant's silence. In Mitchell v. United States, the United States Supreme Court made two very narrow holdings: the entry of a guilty plea does not waive a defendant's Fifth Amendment privileges at sentencing, and, "*in determining facts about the crime which bear upon the severity of the sentence ... a sentencing court may not draw*" an adverse inference from the defendant's silence. 526 U.S. 314, 316-17 (1999) (emphasis added). Applying those principles, the Mitchell Court held that "[b]y holding petitioner's silence against her in determining the facts of the offense at the sentencing hearing"—those facts being the amount of the controlled substance at issue—"the District Court imposed an impermissible burden on the exercise of the constitutional right against compelled self-incrimination." Id. at 330.

But Mitchell made it clear that not all adverse inferences based on a defendant's silence at sentencing are prohibited:

The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege. *Whether silence bears upon the determination of a lack of remorse, or upon acceptance of responsibility for purposes of the downward adjustment provided in § 3E1.1 of the United States Sentencing Guidelines (1998), is a separate question.* It is not before us, and we express no view on it.

Id. (emphasis added).

The United States Supreme Court has reaffirmed that Mitchell does not stand as a bar on all negative inferences based on a defendant's silence at sentencing. To the contrary, the White v. Woodall Court pointed out that while the privilege against self-incrimination applies at sentencing, "it is not uncommon for a constitutional rule to apply somewhat differently at the penalty phase than it does at the guilt phase." 134 S.Ct. 1697,

1703 (2014). And indeed, noted the Woodall Court, “*Mitchell* itself leaves open the possibility that some inferences might permissibly be drawn from a defendant’s penalty-phase silence.” Id. Moreover, the Court clarified that the Mitchell holding was framed “narrowly, in terms implying that it was limited to inferences pertaining to the facts of the crime.” Id. The Woodall Court thus concluded that 1) “if *Mitchell* suggests that *some* actual inferences might be permissible at the penalty phase, it certainly cannot be read to require a *blanket* no-adverse-inference instruction at every penalty-phase trial”; and 2) where the defendant pleads guilty to “all of the charges he faced, including the applicable aggravating circumstances,” that “any inferences that could have been drawn from [defendant’s] silence would arguably fall within the class of inferences as to which *Mitchell* leaves the door open.” See id. at 1704 (emphasis in original).

Here, the district court’s questioning regarding the seller of the vehicle did not clearly violate Kerr’s unwaived Fifth Amendment rights. As a threshold matter, Kerr has failed to show that he affirmatively asserted his Fifth Amendment right to remain silent. “Ordinarily, to be afforded the protections of the Fifth Amendment, a defendant must affirmatively invoke the privilege.” State v. Powell, 161 Idaho 774, 777, 391 P.3d 659, 662 (2017) (citing United States v. Monia, 317 U.S. 424, 427, 63 S.Ct. 409, 410–11, 87 L.Ed. 376, 379–80 (1943); State v. Crowe, 131 Idaho 109, 112, 952 P.2d 1245, 1248 (1998)). A defendant has a “duty to claim the privilege ... even when the government is unquestionably attempting to compel a response.” Powell, 161 Idaho at 777, 391 P.3d at 662 (citing Garner v. United States, 424 U.S. 648, 654, 96 S.Ct. 1178, 1182, 47 L.Ed.2d 370, 377 (1976)). The record reflects that Kerr did not invoke his right to silence; rather,

he responded to the district court's question by stating he did not know the answer, a statement the district court found to be dishonest. (See Tr., p. 16, L. 18 – p. 17, L. 5.)

Further, Kerr has failed to show that the district court unconstitutionally compelled his statement about the car seller's identity by placing him in a "classic penalty" situation. See Powell, 161 Idaho at 777-78, 391 P.3d at 662-63; Minnesota v. Murphy, 465 U.S. 420 (1984). To show a classic penalty, Kerr must establish that the court asserted, "either expressly or impliedly, that invocation of the Fifth Amendment will lead to a substantial penalty." See Powell, 161 Idaho at 778, 391 P.3d at 663. And even if there was such a threat, not all threatened penalties are "sufficiently compelling" to constitute a classic penalty. Id. at 779, 391 P.3d at 664. For example, the United States Supreme Court has held that threatening an already-convicted medium-security prisoner with a transfer to maximum security, with a concomitant loss of privileges, wage opportunities, and facility access, was not sufficiently compelling to violate his Fifth Amendment rights. McKune v. Lile, 536 U.S. 24, 35-48 (2002) (finding "[a] broad range of choices that might infringe constitutional rights in a free society fall within the expected conditions of confinement of those who have suffered a lawful conviction"); but see Powell, 161 Idaho at 780-81, 391 P.3d at 665-66 (finding unlawful compulsion where an inmate faced a "threat of denied parole [which] was a sufficiently substantial penalty to compel [the defendant] to self-incriminate"). Here, Kerr contends the district court "was unambiguously laying the trap" for him by asking him to reveal the name of the seller (Appellant's brief, p. 8), but he does not establish that considering retained jurisdiction unless the name was revealed was a sufficiently compelling penalty. Like McKune, Kerr had already been convicted of the crime, and like McKune's medium-

security and maximum-security housing options, Kerr's options here were prison or the "prison-like experience" of a rider. State v. Coassolo, 136 Idaho 138, 143, 30 P.3d 293, 298 (2001). Moreover, the "decision to relinquish jurisdiction or grant probation is committed to the district judge's discretion." Id.; I.C. § 19-2601. Because Kerr has failed to show that the court not considering a rider rose to the level of a classic penalty situation, he has failed to show that any unconstitutional compulsion violated his rights here.

Moreover, Kerr fails to show that the topic he was questioned on would have been incriminating, because he fails to show his own right against self-incrimination would cover questions about the identity of a third party. While giving the name of the vehicle supplier would obviously incriminate the third party, Kerr fails to show this information would be "self-incriminating," either as to the instant offense or to other crimes. Kerr had already pleaded guilty to grand theft by possession of stolen property (R., pp. 82-83), and knowledge of the name of the vehicle's prior possessor is not an element of that offense (see I.C. § 18-2403(4)). Kerr does not allege that questions about the third party's name would have constituted improperly "determining facts about" the instant offense, such that Mitchell would prohibit them. See Mitchell, 526 U.S. at 316-17.

Kerr instead theorizes that had he supplied the name, Kerr himself could have then been charged with a new crime: conspiracy to transfer a stolen vehicle. (Appellant's brief, p. 7 (citing I.C. §§ 49-228, 18-1701).) This appears to draw from the logic in Komen, in which the Idaho Supreme Court reversed a district court that "relinquished jurisdiction solely because Defendant refused to waive his Fifth Amendment right and answer questions that could incriminate him and result in new felony charges."

160 Idaho 534, 540, 376 P.3d 738, 744. But this argument fails, because Kerr fails to show that merely revealing knowledge of the co-conspirator's name could result in a new charge against him. A co-conspirator's name is not an element of a conspiracy charge. See I.C. § 18-1701; see also I.C.J.I. 1101 (allowing "another unknown person" as a model jury instruction on the element of the co-conspirator's identity). Furthermore, Kerr himself had already voluntarily placed all potentially relevant facts about the hypothetical co-conspirator into the presentence report—he described the individual's existence, Kerr's interactions with the individual, and ultimate receipt of the car from the individual. (PSI, pp. 3-4.) To the extent those facts could be relevant to a hypothetical conspiracy charge, Kerr himself had already adduced them. This case is therefore distinguishable from Komen, insofar as Kerr has failed to show, in light of what he had already volunteered, that the *additional* revelation of the individual's name would substantiate a conspiracy charge against Kerr.

Along the same lines, even if Kerr can show that he had a Fifth Amendment right not to reveal the name of the third party, he cannot show he did not waive that right. The record reveals that Kerr himself described his interaction with the individual who sold him the vehicle, and Kerr volunteered to the presentence investigator that he knew the person's name. (PSI, p. 4.) "It is well established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details," and a "witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry." Mitchell, 526 U.S. at 321-22 (citing Rogers v. United States, 340 U.S. 367, 373 (1951)). The Idaho Supreme Court has similarly concluded that a witness is not precluded from "testifying voluntarily

in matters which may incriminate him,” and that statements voluntarily made are “admissible in a subsequent criminal prosecution.” See Komen, 160 Idaho at 538-39, 376 P.3d at 742-43 (“Had Defendant submitted to the polygraph examination and made incriminating statements, those statements may have been held not to have been compelled and therefore admissible in a subsequent criminal prosecution.”). Having opened the door and provided information not only about interacting with the individual, but about knowing his name, Kerr cannot claim an unwaived privilege was violated simply because the district court asked a follow-up question about a detail—i.e., what was the name.

Lastly, because Mitchell leaves open the question of whether permissible inferences may be drawn from a defendant’s silence at sentencing, the district court here did not clearly violate Kerr’s Fifth Amendment rights by basing its decision, in part, on an inference about his honesty, and properly imposed his sentence. The district court’s exchange with Kerr, after it imposed sentence but before deciding whether to retain jurisdiction, was as follows:

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 this 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 about who you got it from.

THE DEFENDANT: 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.”

THE DEFENDANT: 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 give you credit for 182 days time served on that sentence.

(Tr., p. 16, L. 18 – p. 17, L. 10.)

Per the court’s own explanation of its ruling, it was concerned from the outset about Kerr’s chances on a rider given his criminal history. And rightly so, because by the age of 23 Kerr had accrued some 35 criminal convictions, and Kerr’s own attorney conceded he had “never seen a client as young as Mr. Kerr that has spent as much time in custody as he has.” (PSI, pp. 4-10; Tr., p. 13, Ls. 14-16.) Nevertheless, the district court was open to considering a rider, and to giving Kerr a “chance ... to be honest” about the crime—but it informed him it would not consider a retained jurisdiction if Kerr was not honest in responding to the court. (Tr., p. 16, Ls. 18-25.) Kerr did not provide the name, and instead responded that he “honestly” did not know who he bought the vehicle from, which is the opposite of what he told the presentence investigator. (Compare Tr., p. 17, Ls. 1-2 with PSI, p. 4.) The district court therefore reasonably concluded that Kerr lied to the presentence investigator, and was not being honest.¹ (Tr. p. 17, Ls. 3-5.)

Like a negative inference justifying a sentencing guideline departure, or a negative inference about a defendant’s remorse—neither of which the United States Supreme

¹ The district court’s finding about Kerr’s honesty was by logical necessity correct: because Kerr told the district court he did not know the name of the individual, he was necessarily not being truthful when he told the presentence investigator he knew the individual’s name. (Compare Tr., p. 17, Ls. 1-2 with PSI, p. 4.) Alternatively, if Kerr was honest when he told the presentence investigator that he knew the individual’s name, then Kerr was necessarily not being truthful to the court when he told the court he “honestly” did not know. Because Kerr’s statements cannot both be true, Kerr was invariably either misrepresenting what he knew to the court, or to the court’s presentence investigator.

Court has held unconstitutional—a negative inference about a defendant’s honesty based on his own contradictory statements would be proper. The district court had preexisting concerns about retaining jurisdiction, given Kerr’s criminal history. (Tr., p. 16, Ls. 22-25.) And because the district court premised considering a rider on Kerr’s honesty, and Kerr’s own admissions mean that he was necessarily dishonest with either the court or its investigator, the district court was within its discretion to draw a negative inference about Kerr’s honesty, and deny him the benefit of a retained jurisdiction.

Kerr is therefore unable to show, in any event, a clear violation of an unwaived constitutional right, and accordingly fails to show the first prong of the fundamental error test.

2. Kerr Has Failed To Show That The Alleged Error Was Not Harmless

Even if Kerr has shown that there was a clear violation of an unwaived constitutional right, he cannot show that such a violation was not harmless. In order to meet the third prong of the fundamental error analysis, “the defendant must demonstrate that the error affected the defendant’s substantial rights, meaning (in most instances) that it must have affected the outcome of the trial proceedings.” Perry, 150 Idaho at 226, 245 P.3d at 978. Kerr has failed to demonstrate that the error affected the outcome of the trial proceedings.

Kerr argues that “the record does not indicate” the district court used the information before it—including the PSI, the victim’s statement, the statements of counsel and Kerr, and Kerr’s criminal history—“in fashioning Kerr’s sentence.” (Appellant’s brief, pp. 8-9.) Rather, Kerr contends that the court’s statements to Kerr “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.” (Appellant’s brief, p. 9.) Kerr contends that when he did not provide the name the court “kept its promise and imposed Kerr’s sentence,” and that “little doubt exists that the district court’s error affected the outcome of Kerr’s sentencing.” (Appellant’s brief, p. 9.)

The problem with this analysis is it ignores the district court’s statements that indicated it did consider Kerr’s history, and as a result of that history, the district court was not “thrilled” about retaining jurisdiction from the start. (See Tr., p. 16, Ls. 18-25.) Moreover, the district court never indicated that it *would* retain jurisdiction if Kerr revealed the individual’s identity; instead, the court simply stated that if Kerr revealed the name it would *consider* a rider, and if he did not, the court would not. (Tr., p. 16, Ls. 20-25.) In other words, the district court never indicated that but for Kerr’s statements he *would have* received a retained jurisdiction. And Kerr has not shown that if he had given the name the court would have retained jurisdiction. As a result, Kerr has failed to show that the district court’s alleged error affected his substantial rights, because he has not shown that but for the claimed error, he would have been placed on a rider.

Because Kerr has not shown a clear violation of a constitutional right, nor that such a violation affected his substantial rights, he fails to show the district court committed fundamental error in retaining jurisdiction.

CONCLUSION

The state respectfully requests this Court affirm Kerr's judgment of conviction and sentence.

DATED this 1st day of September, 2017.

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

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 1st day of September, 2017, served two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

DANIEL G. COOPER
CONFLICT PUBLIC DEFENDER
P. O. BOX 387
COEUR D'ALENE, ID 83816-0387

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

KDG/dd