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IN THE SUPREME COURT OF THE STATE OF IDAHO

| | | |
|-----------------------|---|-----------------------------|
| STATE OF IDAHO, |) | |
| |) | NO. 45271 |
| Plaintiff-Respondent, |) | |
| |) | ADA COUNTY NO. CR01-17-2856 |
| v. |) | |
| |) | |
| ROBERT RAY FERGUSON, |) | APPELLANT'S BRIEF |
| |) | |
| Defendant-Appellant. |) | |
| <hr/> | | |

BRIEF OF APPELLANT

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

**HONORABLE MELISSA MOODY
District Judge**

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STATEMENT OF THE CASE

Nature of the Case

In this appeal, Robert Ray Ferguson asserts the district court committed fundamental error by failing to inquire into his understanding of the consequences of a persistent violator sentencing enhancement before accepting his admissions to two prior felony convictions.

Statement of the Facts and Course of Proceedings

Right after the jury verdict in his trial, and without the district court inquiring into his understanding of the consequences, Mr. Ferguson admitted to two prior felony convictions. Those admissions exposed him to a life sentence. Based on his admissions, the district court found Mr. Ferguson was a persistent violator and imposed a sentence of fifteen years to life.

Mr. Ferguson had dropped out of school after eleventh grade, to help support his family. (*See* Presentence Report, Apr. 20, 2012 (*hereinafter*, PSI), p.10.)¹ He struggled with depression, and often used alcohol and illegal drugs to self-medicate. (*See* PSI, pp.11-12.) He met Julie Snow at a homeless shelter. (*See* Tr., p.149, Ls.15-18.) They began a relationship and moved into a motel room. (*See* Tr., p.150, Ls.3-14, p.170, Ls.18-25.) The allegations against Mr. Ferguson stemmed from an altercation that happened when Ms. Snow invited one of her friends to the motel room. (*See generally* Tr., pp.149-69, 191-215, 263-90.)

The jury in Mr. Ferguson's trial convicted him of felony aggravated battery² and use of a deadly weapon during the commission of a crime.³ (Tr., p.329, L.21 – p.330, L.10.) Mr. Ferguson was emotional after the jury verdict. The district court recognized that; following his admissions to the prior felony convictions, the district court thanked Mr. Ferguson and told

¹ The PSI was from one of Mr. Ferguson's prior cases, Ada County No. CR 2011-18003.

² I.C. §§ 18-903(a) and 18-907(b).

him, “I don’t mean to torture you with all of this. . . . I know it has been an emotional verdict for you.” (See Tr., p.336, Ls.20-25.)

Immediately after the jury verdict, Mr. Ferguson requested that the district court poll the jury. (Tr., p.330, Ls.14-18.) One by one, each juror confirmed that the guilty verdict was their personal and true verdict. (Tr., p.330, L.19 – p.332, L.10.)

After polling the jury, the district court told them, “I am going to impose upon you to remain in the jury room for ten more minutes for reasons that I will come and explain to you personally. But I do need you to stick around for approximately 10 to 15 more minutes at the end of this long day.” (Tr., p.332, Ls.11-18.) The jury exited the courtroom, and Mr. Ferguson requested that the district court not order a PSI. (See Tr., p.332, L.19 – p.333, L.19.) The district court declined to order a PSI, and scheduled the sentencing hearing. (See Tr., p.333, L.20 – p.334, L.5.)

The district court then turned right away to the persistent violator sentencing enhancement,⁴ stating, “Mr. Ferguson, the State alleges that you are a persistent violator of the law. As you know, you have the right to have the State prove those convictions beyond a reasonable doubt.” (Tr., p.334, Ls.6-9.) The district court asked him, “[h]ave you talked to your attorney about that,” and he replied, “[y]es, ma’am.” (Tr., p.334, Ls.10-12.)

The district court informed Mr. Ferguson, “[a]nd I have got the jury waiting, as you heard me tell them to wait. If you want the State to prove this, I will bring them back. It’s not a problem.” (Tr., p.334, Ls.13-16.) He answered, “[n]o, ma’am.” (Tr., p.334, L.17.)

The district court placed Mr. Ferguson under oath. (Tr., p.334, Ls.18-20.) The district court asked him: “The State alleges that, on or about the 27th of June, 2012, that you were

³ I.C. § 19-2520.

convicted of the crime of aggravated assault, a felony, in Ada County, Idaho, in Case No. CR-FR-2011-0018003. Do you admit or deny the allegation?” (Tr., p.335, Ls.3-7.) The district court also asked Mr. Ferguson: “And the State also alleges that, on or about March 30, 2000, that you were convicted of the crime of battery with a deadly weapon, a felony, in Washoe, or Washoe County, Nevada, Case No. CR-992330. Do you admit or deny that allegation?” (Tr., p.335, Ls.9-14.) Mr. Ferguson admitted to both allegations. (Tr., p.335, Ls.8, 15.)

After the admissions, the district court showed Mr. Ferguson the judgments of conviction from those prior cases. (*See* Tr., p.335, L.16 – p.336, L.19.) However, over the course of Mr. Ferguson’s admissions, the district court did not inform him of his right not to testify. (*See generally* Tr., p.332, L.20 – p.336, L.25.) While the district court confirmed Mr. Ferguson had spoken with his attorney about the persistent violator sentencing enhancement, it did not inquire into what his attorney had advised him. (*See* Tr., p.334, Ls.6-11.) The district court had mentioned the potential consequences of being found a persistent violator at a pretrial conference some two weeks prior, when the State sought leave to file the enhancement. (*See* Tr., p.24, L.22 – p.25, L.8.) But before Mr. Ferguson admitted to the prior felony convictions, the district court did not inquire into whether he understood the enhancement would increase his sentence by at least five years, and expose him to a life sentence. (*See* Tr., p.334, L.6 – p.335, L.15.)

At the sentencing hearing, the district court noted that Mr. Ferguson had “admitted the underlying two felony predicates that form the basis for the persistent violator sentencing enhancement.” (Tr., p.361, Ls.8-11.) The district court’s judgment of conviction stated Mr. Ferguson was guilty of being a persistent violator. (R., p.128.) The district court imposed

⁴ I.C. § 19-2514.

upon him a unified sentence of life imprisonment, with fifteen years fixed. (R., pp.127-31; Tr., p.361, Ls.12-25.)⁵

Mr. Ferguson filed a Notice of Appeal timely from the district court's Judgment of Conviction and Commitment. (R., pp.135-37.)

⁵ For the use of a deadly weapon sentencing enhancement, the district court imposed a separate sentence of five years fixed, concurrent with the sentence for aggravated battery. (*See* R., p.128; Tr., p.362, Ls.15-25.) However, "enhancements are not considered to be a new offense for which there is a separate sentence. Rather, the enhancement is an additional term and is part of a single sentence for the underlying crime." *State v. Burnight*, 132 Idaho 654, 658-59 (1999). To date, Mr. Ferguson has not filed an Idaho Criminal Rule 35 motion to correct an illegal sentence.

ISSUE

When Mr. Ferguson admitted to his prior felony convictions, did the district court commit fundamental error by failing to inquire into his understanding of the consequences of a persistent violator sentencing enhancement before accepting the admissions?

ARGUMENT

When Mr. Ferguson Admitted To His Prior Felony Convictions, The District Court Committed Fundamental Error By Failing To Inquire Into His Understanding Of The Consequences Of A Persistent Violator Sentencing Enhancement Before Accepting The Admissions

A. Introduction

Mr. Ferguson asserts that when he admitted to his prior felony convictions, the district court committed fundamental error by failing to inquire into his understanding of the consequences of a persistent violator sentencing enhancement before accepting the admissions. The district court's failure to inquire violated Mr. Ferguson's unwaived constitutional right to due process. This error plainly exists, and was not harmless.

B. Standard Of Review

Although Mr. Ferguson did not object before the district court to the failure to inquire (*see generally* Tr., pp.332-36), this Court may review the issue under the fundamental error doctrine. Review for fundamental error involves a three-pronged inquiry where the defendant must show the appellate court that the alleged 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. *State v. Perry*, 150 Idaho 209, 228 (2010).

C. The District Court's Failure To Inquire Into Mr. Ferguson's Understanding Of The Consequences Before Accepting His Admissions Violated His Unwaived Constitutional Right To Due Process

Mr. Ferguson asserts that the district court's failure to inquire into his understanding of the consequences before accepting his admissions violated his unwaived constitutional right to due process. The Fourteenth Amendment to the United States Constitution provides that no

State may “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

When the State seeks a persistent violator sentencing enhancement, the defendant is entitled to a jury trial on the State’s allegation of previous felony convictions. *State v. Dunn*, 44 Idaho 636, 640 (1927). In *State v. Cheatham*, 139 Idaho 413 (Ct. App. 2003), the Idaho Court of Appeals held, “[w]e are persuaded that due process principles preclude the acceptance of a stipulation to the truth of persistent violator allegations without judicial inquiry to determine that the defendant makes the admission voluntarily and with an understanding of the consequences.” *Id.* at 418. The *Cheatham* Court concluded:

Although we do not deem a full [*Boykin v. Alabama*, 395 U.S. 238 (1969)] litany to be necessary, we hold that a stipulation to the truth of a persistent violator allegation will be valid only if the record shows that the defendant entered into the stipulation voluntarily in the sense that the defendant was not coerced, and knowingly in the sense that the defendant understands the potential sentencing consequences.

Id.

In *Boykin*, the United States Supreme Court outlined the standards to ensure that a guilty plea is knowing, intelligent and voluntary. *See Boykin*, 395 U.S. at 242-44. The *Boykin* Court held, “[i]t was error, plain on the face of the record, for the trial judge to accept petitioner’s guilty plea without an affirmative showing that it was intelligent and voluntary.” *Id.* at 242. The Court discussed how “[s]everal federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial”; namely, the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one’s accusers. *Id.* at 243. The *Boykin* Court stated, “[w]e cannot presume a waiver of these three important federal rights from a silent record.”

The *Boykin* Court also noted it had previously held that “if a defendant’s guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.” *Id.* at 243 n.5 (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). According to the Court, “[w]hat is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.” *Id.* at 243-44.

What is at stake for a defendant facing a persistent violator sentencing enhancement demands similar solicitude. The *Cheatham* Court observed that, “[u]nder Idaho law, the detriment from being found a persistent violator is dramatic. Idaho Code § 19-2514 mandates that a persistent violator be sentenced to not less than five years’ imprisonment and authorizes up to life imprisonment, regardless of the maximum sentence otherwise fixed by statute for the new offense.” *Cheatham*, 139 Idaho at 418. “The defendant may be subject to a sentence ‘many times as great as that prescribed by statute for the offense.’” *Id.* (quoting *State v. Lovejoy*, 60 Idaho 632, 638 (1939)). The Court then stated, “[a] waiver of the right to trial on a recidivist charge therefore ought not be treated lightly.” *Id.*

Thus, the due process principles identified by the *Cheatham* Court apply here, even though Mr. Ferguson admitted to the prior felony convictions rather than have counsel stipulate to them. Like the defendant in *Cheatham*, Mr. Ferguson essentially waived his right to a jury trial on the persistent violator sentencing enhancement. (*See Tr.*, p.334, Ls.6-17.) His admissions allowed the district court to find he was a persistent violator, exposing him to the dramatic detriment of a potential life sentence. *See Cheatham*, 139 Idaho at 418. Thus, Mr. Ferguson’s admissions were not valid unless the record shows he entered them “voluntarily

in the sense that the defendant was not coerced, and knowingly in the sense that the defendant understands the potential sentencing consequences.” *See id.*

The record here does not show that Mr. Ferguson admitted to the prior felony convictions with an understanding of the potential consequences of a persistent violator sentencing enhancement, because the district court did not inquire into his understanding. The district court examined Mr. Ferguson without asking him if he understood the persistent violator sentencing enhancement would increase his sentence by at least five years, and expose him to a potential life sentence. (*See generally* Tr., pp.334-36.) Rather, the district court’s questions to Mr. Ferguson focused on the prior judgments. (*See* Tr., p.335, L.3 – p.336, L.11.) Although the district court asked Mr. Ferguson if he had talked to his attorney about the enhancement (*see* Tr., p.334, Ls.10-11), the district court did not have him elaborate on what exactly he had discussed with counsel before putting him under oath (*see* Tr., p.334, Ls.12-20). In sum, while the district court wanted to make “absolutely sure” that Mr. Ferguson had an opportunity to review the prior judgments (Tr., p.336, Ls.12-16), it failed to ensure that he understood the consequences of his admissions. Thus, the district court’s failure to inquire violated Mr. Ferguson’s unwaived constitutional right to due process. *See Cheatham*, 139 Idaho at 418.

D. The Error Plainly Exists

Mr. Ferguson asserts the district court’s error in failing to inquire 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. *See Perry*, 150 Idaho at 228. Even assuming Mr. Ferguson sought to avoid going through a second part of the jury trial, that would not have obviated his constitutional right to due process when he admitted to the prior convictions and the district court accepted the admissions. Further, the record does not indicate

Mr. Ferguson's counsel made a tactical decision to have the district court fail to inquire into his client's understanding of the consequences of a persistent violator sentencing enhancement, considering the admissions exposed Mr. Ferguson to a potential life sentence. Thus, the error here plainly exists.

E. The Error Was Not Harmless

Mr. Ferguson asserts the district court's error in failing to inquire into his understanding of the consequences of a persistent violator sentencing enhancement before accepting the admissions was not harmless. *See Perry*, 150 Idaho at 228. As discussed above, being a persistent violator increases a defendant's sentence by at least five years, and exposes the defendant to a potential life sentence. I.C. § 19-2514.

Here, Mr. Ferguson would not have been exposed to a life sentence without the persistent violator sentencing enhancement. The maximum penalty for the underlying offense, felony aggravated battery, is fifteen years imprisonment. I.C. § 18-908. The use of a deadly weapon sentencing enhancement increases "the maximum sentence authorized for the crime for which the person was convicted by fifteen (15) years." I.C. § 19-2520.

Put otherwise, the maximum penalty for aggravated battery with a use of a deadly weapon sentencing enhancement is thirty years imprisonment. Thus, without the persistent violator sentencing enhancement, Mr. Ferguson would not have been exposed to a life sentence. The district court ultimately imposed a unified sentence of life imprisonment, with fifteen years fixed. (R., p.128.) Therefore, the district court's error in failing to inquire into Mr. Ferguson's understanding of the consequences of a persistent violator sentencing enhancement before accepting the admissions was not harmless.

The district court's failure to inquire violated Mr. Ferguson's unwaived constitutional right to due process. This error plainly exists, and was not harmless. Thus, Mr. Ferguson has shown the district court committed fundamental error by failing to inquire into his understanding of the consequences of a persistent violator sentencing enhancement before accepting his admissions. *See Perry*, 150 Idaho at 228. Mr. Ferguson's sentence should be vacated, and the matter should be remanded to the district court to readdress the persistent violator allegations, including conducting a trial on those allegations if necessary, and for subsequent resentencing. *See Cheatham*, 139 Idaho at 418-19.

CONCLUSION

For the above reasons, Mr. Ferguson respectfully requests that this Court vacate his sentence and remand the matter to the district court for resentencing, following a trial or other proper disposition of the persistent violator allegations.

DATED this 14th day of February, 2018.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of February, 2018, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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Administrative Assistant

BPM/eas