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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
) No. 45271
 Plaintiff-Respondent,)
) Ada County Case No.
 v.) CR01-2017-2856
)
 ROBERT RAY FERGUSON,)
)
 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 MELISSA MOODY
District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Robert Ray Ferguson appeals from his conviction for aggravated battery with deadly weapon and persistent violator enhancements. Specifically, he challenges his admission to being a persistent violator.

Statement Of The Facts And Course Of The Proceedings

The state charged Ferguson with aggravated battery with an enhancement for use of a deadly weapon. (R., pp. 45-46.) The state filed a motion to add a “Part II” to the information charging the enhancement for being a persistent violator. (R., pp. 78-83.) The district court took the motion up at the pretrial conference. (R., p. 87.) The district court arraigned Ferguson on the amendment. (Tr., p. 23, L. 15 – p. 25, L. 24.) In the course of that arraignment the district court explained to Ferguson that if he were found to be a persistent violator as charged, “any sentence that would be imposed on your felony in this case can be increased by a minimum of five years, all the way up to life.” (Tr., p. 25, Ls. 4-8.) When asked if he had questions about how the persistent violator enhancement worked, Ferguson represented that he did not. (Tr., p. 25, Ls. 9-11.)

The case proceeded to a two-day jury trial eleven days later. (R., pp. 93-105.) The jury found Ferguson guilty of aggravated battery and use of a deadly weapon. (R., p. 123.) Ferguson thereafter admitted the persistent violator enhancement. (Tr., p. 334, L. 22 – p. 336, L. 20.) The district court imposed a life sentence with 15 years determinate. (R., pp. 127-30; Tr., p. 361, Ls. 12-23.) Ferguson filed a timely notice of appeal. (R., pp. 135-36.)

ISSUE

Ferguson states the issue on appeal as:

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?

(Appellant's brief, p. 5.)

The state rephrases the issue as:

Is Ferguson's claim of fundamental error without merit because the record shows he did understand the consequences of being found to be a persistent violator?

ARGUMENT

Ferguson's Claim Of Fundamental Error Is Disproved By The Record

A. Introduction

The district court accepted Ferguson's admission to being a persistent violator. (Tr., p. 334, L. 22 – p. 336, L. 20.) Ferguson did not object to the court's colloquy (Tr., p. 334, L. 22 – p. 336, L. 20), nor did he move to withdraw his admission (see generally R.). Only after sentencing, for the first time on appeal, did Ferguson assert that his admission was inadequate. (Appellant's brief.) His claim of fundamental error does not withstand scrutiny, however, because the record establishes that he in fact did know the sentencing consequences of his admission.

B. Standard Of Review

An appellate court will reverse based on an unobjected-to error only when the defendant establishes the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) affected the outcome of the trial proceedings. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010).

C. Ferguson's Claim Of Fundamental Error Fails On All Three Prongs

Ferguson has failed to show fundamental error. He had a right to a jury determination of the persistent violator enhancement allegation. State v. Lovejoy, 60 Idaho 632, 95 P.2d 132, 134 (1939). This right is not itself constitutional, but instead arises from the Court's inherent powers to assure the fairness of trials. State v. Johnson, 86 Idaho 51, 62, 383 P.2d 326, 332 (1963) ("Absent legislative direction, this Court not only has the

authority, but the duty to adopt procedure designed to safeguard the rights of an accused to a fair and impartial trial.”). See also Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (constitutional right to jury determination of facts enhancing sentences does not apply to “the fact of a prior conviction”). Despite not being of constitutional origin, the right to jury determination of persistent violator status must be afforded due process. State v. Cheatham, 139 Idaho 413, 418, 80 P.3d 349, 354 (Ct. App. 2003).

Due process requires that a defendant’s waiver of the right to a jury determination of persistent violator status be made “voluntarily and with an understanding of the consequences.” Id. This due process requirement is less than that required for entry of a valid guilty plea. Id. (rejecting requirement of a “full [Boykin v. Alabama, 395 U.S. 238 (1969),] litany”). Rather it merely requires that the admission by the defendant not be “coerced” and be made with an understanding of “the potential sentencing consequences.” Id.

The record shows that Ferguson gave an uncoerced admission to two prior felony convictions. (Tr., p. 334, L. 22 – p. 336, L. 20.) It further shows that he understood the potential consequences, as those had been explained to him less than two weeks previously when he was arraigned on the enhancement. (Tr., p. 25, Ls. 4-11.) The record shows there was no due process violation, much less that there was a clear due process violation. Ferguson’s claim fails on the first and second elements of fundamental error. Moreover, he also fails on the second prong because this record does not disprove the possibility of “sand bagging,” waiting to claim his admission was unknowing until after the sentence was imposed. Finally, there is no prejudice because nothing in the record suggests that, had he been asked if he understood the consequences, Ferguson would have elected to have the

jury decide the issue. Finally, even if he had elected for a jury determination, the evidence of the two prior convictions was overwhelming. (See, e.g., Court's Exhibit 3.)

On appeal Ferguson argues that the district court violated the due process requirements of Cheatham and Boykin. (Appellant's brief, 6-9.) The state agrees that Cheatham's requirement of a voluntary and knowing admission applies, but Ferguson's reliance on Boykin is misplaced. Cheatham, 139 Idaho at 418, 80 P.3d at 354 ("we do not deem a full *Boykin* litany to be necessary"). Ferguson's argument fails because it does not consider the whole record. Despite acknowledging in his factual recitation that the district court specifically informed him of the consequences of being found a persistent violator less than two weeks prior to accepting his admissions (Appellant's brief, p. 3), Ferguson simply ignores that part of the record when he makes his argument (Appellant's brief, pp. 6-9). The record shows that Ferguson in fact understood the potential sentence and therefore entered his admissions with an understanding of the consequences. Ferguson has shown neither that he had a due process right to be asked his understanding at the moment of his admissions nor that he was in fact ignorant of the potential sentence.

Ferguson also argues that the error was clear (Appellant's brief, p. 9), but without mention of the fact that the record shows that he was informed of the potential consequences of being found a persistent violator. He also argues, trying to reverse the burden, that the record "does not indicate" that the lack of an objection was tactical. (Appellant's brief, pp. 9-10.) It is hardly surprising, however, that counsel did not articulate in open court his reasons for not objecting. The record certainly is not *clear* that the lack of an objection was not tactical, either because counsel knew Ferguson understood the consequences of the admissions (because explained by the court and by counsel),

because a jury finding was nearly assured based on the evidence, or because the defense wished to see how the sentencing proceeded.

Ferguson argues he was prejudiced because his sentence of life with 15 years determinate ultimately depended on the persistent violator enhancement. (Appellant's brief, pp. 10-11.) However, because the admission was made at trial, his burden is to show that the alleged fundamental error "affected the outcome of the trial proceedings." State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010). Because it is the finding of being a persistent violator that he claims violated his due process rights, the only way the trial would have come out differently but for the error is if he was found not to be a persistent violator. Ferguson's assumptions that, had he been informed of the consequences of admitting being a persistent violator he would (a) not have admitted being a persistent violator and (b) not been convicted of being a persistent violator when the enhancement was submitted to the jury are unsupported by the record. He has failed to show prejudice.

Ferguson's claim of fundamental error is disproved by the record, which shows he in fact knew the potential sentence that would arise from being found a persistent violator. The record does not support Ferguson's claim of a clear and prejudicial constitutional error.

CONCLUSION

The state respectfully requests this Court to affirm Ferguson's conviction and sentence.

DATED this 6th day of March, 2018.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 6th day of March, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BEN P. McGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Kenneth K. Jorgensen
KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/dd