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State v. Gneiting Appellant's Brief Dckt. 46781

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Idaho Supreme Court
Karel Lehrman, Clerk of the Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 46781-2019**
Plaintiff-Respondent,	)	
	)	**BONNEVILLE COUNTY NO.**
v.	)	**CR-2018-815**
	)	
NICOLE LYN GNEITING,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

HONORABLE BRUCE L. PICKETT
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Nicole Gneiting was stopped, arrested, and searched incident to arrest. Despite suspicions that Ms. Gneiting had an item of contraband down her pants, the officers waited until she was at the jail before they conducted a full search. During the full search at the jail, officers located methamphetamine on Ms. Gneiting's person. Therefore, she was charged with both trafficking and introduction of contraband into a jail. After a jury trial, Ms. Gneiting was convicted of trafficking, introduction of contraband, and possession of a controlled substance, Xanax. The district court sentenced Ms. Gneiting to an aggregated term of fifteen years, with three and one-half years fixed.

Ms. Gneiting contends the State's evidence was insufficient to establish she introduced major contraband into a jail. Ms. Gneiting respectfully requests this Court vacate the district court's judgment of conviction as to this count.

The Idaho appellate courts have yet to address the issue of what mens rea is required to find a defendant guilty of possessing contraband in a facility where the defendant brought the contraband in upon their person upon initial arrest. To put it another way, does a defendant have the requisite mens rea to commit the crime where they did not voluntarily enter the prison or correctional facility? There is a split amongst other jurisdictions on this question.

Statement of the Facts and Course of Proceedings

On January 20, 2018, Nicole Gneiting was locked out of her car. (Trial Tr., p.319, Ls.23-25; p.325, Ls.14-25.) Earlier that night, she had purchased an ounce of methamphetamine. (Trial Tr., p.320, Ls.2-22.) Soon after buying the methamphetamine, Ms. Gneiting got high. (Trial Tr., p.321, Ls.20-25.) She and two friends injected 2-3 grams of methamphetamine.

(Trial Tr., p.322, Ls.1-22.) While high, Ms. Gneiting tried to access her locked car. (Trial Tr., p.319, L.23 – p.320, L.6.) She was locked out but got into the car through the window. (Trial Tr., p.325, Ls.16-18.) However, entering the car through the window triggered the alarm, and Ms. Gneiting could not get it to shut off. (Trial Tr., p.325, Ls.16-19.) Law enforcement was contacted by a hotel and responded to the report of a possible car break-in. (Trial Tr., p.153, L.21 – p.154, L.25.) They made contact with Ms. Gneiting and the man with her at the car. (Trial Tr., p.155, L.1 – p.156, L.9; p.325, Ls.24-25.)

Based on information gleaned from the man Ms. Gneiting was with, officers searched a hotel room the man, and possibly Ms. Gneiting, had stayed in. (Trial Tr., p.121, Ls.5-18; p.156, L.19 – p.159, L.20.) Ms. Gneiting was arrested for possessing controlled substances after a purse was found in the hotel room which contained her driver's license and some prescription medications. (Trial Tr., p.121, L.5 – p.124, L.22; p.127, Ls.2-13.) When Ms. Gneiting was consensually pat-searched, the officer noticed a bulky item in her pants, but Ms. Gneiting told the officer that she was on her period and the bulky item down the back of her pants was a maxi-pad. (Trial Tr., p.114, Ls.19 – p.121, L.2; p.125, L.17 – p.127, L.13; p.319, Ls.5-14.) Despite suspicions that Ms. Gneiting had an item of contraband down her pants, the officers waited until she was at the jail before they conducted a full search.[1] (Trial Tr., p.115, Ls.10 – p.121, L.2; p.126, L.19 – p.132, L.19.) Officer Jamie Nunnelly asked Ms. Gneiting several times if she had anything illegal on her person, but each time she said she did not.[2] (Trial Tr., p.127, L.14 –

[1] Officer Nunnelly "adamantly believed" that Ms. Gneiting had something illegal on her person. (Trial Tr., p.127, Ls.14-24.)

[2]Without a sufficient promise of immunity, both Article I, section 13, of the Idaho Constitution and the Fifth Amendment to the United States Constitution prevent the state from forcing a defendant to choose between admitting possession of a controlled substance and being charged with introducing that substance into a correctional facility. *See e.g.*, *State v. Thaxton*, 79 P.3d 897, 899 (Or. Ct. App. 2003).

p.128, L.2.) When Ms. Gneiting was brought to the jail, Officer Nunnelly advised the sergeant on duty that she suspected Ms. Gneiting had narcotics down her pants. (Trial Tr., p.131, Ls.1-19; p.202, Ls.19-25.) Upon strip-searching Ms. Gneiting, officers located three packages of methamphetamine in an envelope between Ms. Gneiting's buttocks. (Trial Tr., p.132, Ls.3-19; p.226, L.19 – p.227, L.14.)

Based on these facts, the State filed an Information alleging Ms. Gneiting committed felony possession of a controlled substance—Adderall,[3] felony trafficking in methamphetamine (28 grams to less than 200 grams), felony possession of certain articles (major contraband) within a correctional facility, misdemeanor possession of marijuana, misdemeanor possession of a controlled substance—Xanax, and misdemeanor possession of drug paraphernalia. (R., pp.36-38.)

The district court held a four-day jury trial. (*See generally* Trial Tr.) In the State's case in chief, the State elicited testimony from the officers who interacted with Ms. Gneiting both on the street and once inside the jail. (Trial Tr., p.110, L.20 – p.242, L.17.) Deputy Cynthia Ojeda testified that she was asked to perform a strip search of Ms. Gneiting on January 20, 2018. (Trial Tr., p.223, L.10 – p.225, L.21.) When she pulled Ms. Gneiting's pants down, she retrieved a white envelope from between Ms. Gneiting's buttocks. (Trial Tr., p.226, L.19 – p.227, L.14.) The envelope contained three baggies which each held a white crystal substance. (Trial Tr., p.258, Ls.7-25; p.259, L.16 – p.260, L.21.) A lab manager for the ISP Forensic Services testified that the substance contained methamphetamine. (Trial Tr., p.261, Ls.19-24.) It was

[3] Count I charged Ms. Gneiting with felony possession of Adderall was dismissed by the district court pursuant to the State's pre-trial motion. (R., pp.113-16.)

determined that the total weight of the item was 31.41 grams. (Trial Tr., 256, L.12 - p.261, L.10.)

Pursuant to I.C.R. 29, Ms. Gneiting's counsel moved for a judgment of acquittal on all counts. (Trial Tr., p.287, L.7 – p.295, L.24.) The district court granted the motion as to the marijuana charge, but denied the motion for the trafficking, contraband in a jail, and Xanax possession charges. (Trial Tr., p.294, Ls.14-23; R., p.131.)

The jury convicted Ms. Gneiting of trafficking methamphetamine, possession of certain articles within a correctional facility, possession of Xanax, and possession of drug paraphernalia. (Trial Tr., p.385, Ls.13-21; R., pp.166-67.) The district court sentenced Ms. Gneiting to a unified term of thirteen years, with three years fixed for trafficking, and two fixed years, to be served consecutively, for possessing certain articles in the jail. (12/5/18 Tr., p.43, L.25 – p.44, L.12; R., pp.179-82.)

Ms. Gneiting filed an I.C.R. 35 motion requesting leniency. (R., pp.177-78.) A hearing was held on Ms. Gneiting's motion during which the district court partially granted the motion, reducing the fixed portion of Ms. Gneiting's sentence from four years to three and one-half years. (1/15/19 Tr., p.60, Ls.2-13; R., pp.186, 189-92.)

Ms. Gneiting filed a Notice of Appeal timely from the district court's judgment of conviction. (R., pp.193-97, 202-08.)

ISSUE

Was there sufficient evidence that Ms. Gneiting knowingly introduced major contraband into a jail?

ARGUMENT

The State Did Not Present Sufficient Evidence To Prove Beyond A Reasonable Doubt That Ms. Gneiting Introduced Major Contraband Into A Jail

A. Introduction

Ms. Gneiting asserts that her possession of methamphetamine in jail was not the result of a voluntary act. Once arrested, Ms. Gneiting no longer had control over her location or her possessions. That control rested with the arresting officer and the corrections officers at the jail. In other words, Ms. Gneiting did not voluntarily enter the jail. Thus, the State failed to prove beyond a reasonable doubt Ms. Gneiting voluntarily possessed major contraband in a jail.

B. Standard Of Review

In *State v. Southwick*, 158 Idaho 173 (Ct. App. 2014), the Court of Appeals outlined the appellate standard of review for sufficiency of the evidence:

> Appellate review of the sufficiency of the evidence is limited in scope. A finding of guilt will not be overturned on appeal 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. Herrera–Brito*, 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct.App.1998); *State v. Knutson*, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct.App.1991). We will not substitute our view for that of the trier of fact as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *Knutson*, 121 Idaho at 104, 822 P.2d at 1001; *State v. Decker*, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct.App.1985). Moreover, we will consider the evidence in the light most favorable to the prosecution. *Herrera–Brito*, 131 Idaho at 385, 957 P.2d at 1101; *Knutson*, 121 Idaho at 104, 822 P.2d at 1001. Substantial evidence may exist even when the evidence presented is solely circumstantial or when there is conflicting evidence. *State v. Severson*, 147 Idaho 694, 712, 215 P.3d 414, 432 (2009); *State v. Stevens*, 93 Idaho 48, 50–51, 454 P.2d 945, 947–48 (1969). In fact, even when circumstantial evidence could be interpreted consistently with a finding of innocence, it will be sufficient to uphold a guilty verdict when it also gives rise to reasonable inferences of guilt. *Severson*, 147 Idaho at 712, 215 P.3d at 432; *State v. Slawson*, 124 Idaho 753, 757, 864 P.2d 199, 203 (Ct.App.1993).

158 Idaho at 177-78.

C. The Evidence Was Insufficient To Prove Ms. Gneiting Possessed Certain Articles Within A Jail Because The State Failed To Prove Ms. Gneiting Voluntarily Entered The Jail Facility

The Information alleged that Ms. Gneiting possessed certain articles within a correctional facility, a violation of I.C. § 18-2510(3) by:

COUNT III
POSSESSION OF CERTAIN ARTICLES WITHIN A CORRECTIONAL FACILITY
Felony, I.C. § 18-2510(3)

> That the Defendant, NICOLE LYN GNEITING, on or about January 20, 2018, in the County of Bonneville, State of Idaho, did possess major contraband, Methamphetamine, a Schedule II controlled substance, within Bonneville County Jail. *(5 years, $10,000 fine or both)*

(R., p.37.) The statute provides: "No person including a prisoner, except as authorized by law or with the permission of the facility head, shall knowingly. . . (c) Possess, or attempt to possess, major contraband within a correctional facility." I.C. § 18-2510(3)(c). However, Ms. Gneiting's act in entering the jail was not a voluntary act.

At trial, the jury was instructed as follows:

> In order for the defendant to be guilty of Possession of Certain Articles within a Correctional Facility, the state must prove each of the following:
>
> 1. On or about January 20, 2018
>
> 2. in the state of Idaho
>
> 3. the defendant Nicole Lyn Gneiting knowingly introduced or attempted to introduce major contraband within a correctional facility.
>
> If any of the above has not been proven beyond a reasonable doubt, you must find defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

(R., p.157.[4]) The jury was instructed regarding possession, "A person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it." (R., p.152.) The jury was also instructed that "[i]n every crime or public offense there must exist a union or joint operation of act and intent." (R., p.150.)

To prove Ms. Gneiting guilty of this offense, the State was required to establish, beyond a reasonable doubt, that Ms. Gneiting "knowingly introduced" (or attempted to introduce) the methamphetamine "within a correctional facility." (R., p.157.) The State has failed to meet its burden where the evidence showed that Ms. Gneiting was arrested and forcibly brought into the jail with the envelope containing methamphetamine still in her pants. (Trial Tr., p.127, Ls.2-13, p.128, Ls.11-13.) Thus, the State failed to present any evidence Ms. Gneiting voluntarily acted to introduce methamphetamine into the jail. Ms. Gneiting was under arrest and involuntarily transported to the location. *See Martin v. State*, 17 So.2d 427 (Ala. Ct. App. 1944) (holding that an accusation of public intoxication cannot be established where an intoxicated defendant was involuntarily and forcibly carried into the street by an arresting officer); *Fontaine v. State*, 762 A.2d 1027 (Md. Ct. Spec. App. 2000) (holding that after a defendant was arrested in Delaware and taken to Maryland by the police, the evidence failed to prove that he intended to distribute marijuana in his possession while in Maryland).

Courts in several jurisdictions have held that where a defendant simply had drugs on his person when he was arrested and taken to jail, he could not be convicted of the offense of introducing contraband into a jail. These courts have held that because the defendant did not voluntarily enter the jail, he could not be guilty of possessing or introducing contraband into a

[4] Ms. Gneiting was initially charged with possessing the item, then, at trial, the jury was instructed that the State sought to prove Ms. Gneiting introduced the item.

correctional facility. *See e.g., State v. Tippetts*, 43 P.3d 455, 457, 459-60 (Or. Ct. App. 2002) (reversing conviction and holding evidence did not show defendant committed voluntary act where he was arrested and taken to jail with marijuana in his pants pocket; "the contraband was introduced into the jail only because the police took defendant (and the contraband) there against his will"); *State v. Eaton*, 177 P.3d 157, 160-65 (Wash. Ct. App. 2008) (holding defendant could not be found guilty because to do so would punish defendant for an involuntary act), *aff'd,* 229 P.3d 704 (Wash. 2010); *State v. Cole*, 164 P.3d 1024, 1026-27 (N.M. Ct. App. 2007) (holding that "to be found guilty of bringing contraband into a jail . . . a person must enter the jail voluntarily"); *State v. Sowry*, 803 N.E. 2d 867, 870 (Ohio Ct. App. 2004) (holding defendant could not be liable for conveying drugs into the detention facility where he had no control over his person once arrested); *but c.f., Brown v. State*, 89 S.W. 3d 630, 633 (Tex. Crim. App. 2002) (holding defendant's act in bringing marijuana into the jail was sufficiently voluntary where Texas law defined "voluntary" as the "absence of an accidental act, omission or possession").

In one such case, the Washington Court of Appeals vacated a sentencing enhancement for possessing methamphetamine in a county jail because the defendant was arrested and involuntarily brought to the county jail where the methamphetamine was then discovered on his person. *Eaton*, 177 P. 3d at 157. The Court agreed with the defendant's contention that "The State should not be allowed to physically force a subject into an enhancement zone and then be permitted to choose whether he will be penalized for possessing contraband in the enhancement zone or the non-enhancement zone in which his possession could also be established." *Id.* 177 P.3d at 159.

The *Eaton* Court examined the plain language of the statute, but also considered *mens rea* and violitional conduct requirements.

> Furthermore, as a general rule, every crime must contain two elements: (1) an actus reus and (2) a mens rea. The actus reus is "[t]he wrongful deed that comprises the physical components of a crime." The mens rea is "[t]he state of mind that the prosecution . . . must prove that a defendant had when committing a crime."

Eaton, 177 P.3d at 159 (internal citations omitted); *see also United States v. Apfelbaum*, 445 U.S. 115, 131 (1980) (in his concurrence, Justice Brennan added, "In the criminal law, both a culpable *mens rea* and a criminal *actus reus* are generally required for an offense to occur"). In *Eaton*, the court recognized that the crime and its enhancement had no *mens rea* requirement, but reasoned:

> But even strict liability punishments, i.e., those crimes and sentence enhancements having no mens rea requirement, require something of an element of volition. "There is a certain minimal mental element required in order to establish the actus reus itself. *This is the element of volition."*

Eaton, 177 P.3d at 160 (emphasis added) (quoting *State v. Utter*, 479 P.2d 946, 948 (Wash. Ct. App. 1971).) The ground rule that conduct must be voluntary before it can be classified as criminal is a foundational rule of law that is not often articulated. This principal has been expressed in at least one treatise:

> At all events, it is clear that criminal liability requires that the activity in question be voluntary. The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred. Likewise, assuming revenge or retribution to be a legitimate purpose of punishment, there would appear to be no reason to impose punishment on this basis as to those whose actions were not voluntary.

1 Wayne R. La Fave, SUBSTANTIVE CRIMINAL LAW § 6.1(c) (3d ed. Oct. 2018) (footnote omitted). The Model Penal Code has said of voluntariness:

> (1) A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.
>
> (2) The following are not voluntary acts within the meaning of this Section:
>
> (a) a reflex or convulsion;
>
> (b) a bodily movement during unconsciousness or sleep;

> (c) conduct during hypnosis or resulting from hypnotic suggestion;
>
> (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

MODEL PENAL CODE § 2.01 (2018).

In determining a defendant's intent, the Idaho Supreme Court has reasoned:

> A person necessarily intends the probable, natural consequences of his own voluntary acts. The only yardstick by which one's intent can be determined is his external acts and conduct, what he does and what he says, and one cannot excuse the probable consequences of one's own voluntary act by claiming that he had a mental reservation and performed the act or acts voluntarily done without an intent. Intent is manifest by the sound mind and discretion of the person accused, and the intent of appellant to do what the jury found he did, is sufficiently established by the commission of the acts and the circumstances surrounding them.

State v. Johnson, 74 Idaho 269, 275-76 (1953) (citing I.C. §§ 18-115, 18-116).

In *State v. Baldwin*, the jury was instructed using the language of the statute, I.C. § 18-114, "You are instructed that in every crime or public offense there must be a union, or joint operation, of act and intent, or criminal negligence." *State v. Baldwin*, 69 Idaho 459, 464 (1949). The *Baldwin* Court held that the instruction should generally be given, and "[i]n cases where the statute defining the offense does not require any specific intent, the commission of the act willfully and knowingly is sufficient." *Id.* The intent required by I.C. § 18-114 is "not the intent to commit a crime but is merely the intent to knowingly perform the interdicted act or by criminal negligence the failure to perform the required act." *State v. Parish*, 79 Idaho 75, 78 (1957) (quoting *State v. Taylor*, 59 Idaho 724, 738 (1939)). Thus, Idaho law requires the commission of the criminal act to be willfully and knowingly.

Because Ms. Gneiting was transported to the jail against her will, her possession of methamphetamine *in the county jail* was not the result of a voluntary act and she cannot be criminally culpable for possessing what she possessed with an increased penalty due solely to her

forcible placement in a jail. Ms. Gneiting had an envelope of methamphetamine down her pants at the time of her search incident to arrest. (Trial Tr., p.115, Ls.10 – p.121, L.2; p.126, L.19 – p.132, L.19.) Like the arrestee in *Martin*, Ms. Gneiting was moved to a location where there was a new or increased penalty for having that same status she had prior to her involuntary movement. *Id*. 17 So.2d 427 (holding "a voluntary appearance was presupposed" under the statute and "an accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer"). Like the arrestee in *Martin*, Ms. Gneiting's act of possessing the methamphetamine inside the jail lacked voluntariness and she cannot be criminally culpable for possessing methamphetamine in the jail.

Once arrested, Ms. Gneiting no longer had control over her location or over any of her possessions. That control rested with the arresting officer and the corrections officers at the jail. In other words, there is a difference between Ms. Gneiting's voluntary act of possessing the methamphetamine before she was arrested, and her involuntary act of possessing the methamphetamine in the county jail. *See State v. Gonzalez*, 71 P.3d 573 (Or. Ct. App. 2003) (mere possession of drugs when a defendant was taken by police to a correctional facility is not legally sufficient to prove that he voluntarily introduced contraband into that facility); *State v. Delaney*, 71 P.3d 93 (Or. Ct. App. 2003) (even assuming that a defendant's actions were so inept that her arrest and the discovery of the contraband were readily foreseeable consequences, she did not voluntarily introduce contraband into a detention center); *but c.f., State v. Thaxton*, 79 P.3d 897 (Or. Ct. App. 2003) (a jury could find that, at the time a defendant hid some marijuana in his sock, he knew that the officers were likely to arrest him and take him to jail).

Idaho law required the State to establish that Ms. Gneiting voluntarily possessed/introduced contraband into a jail. This it did not do where Ms. Gneiting was arrested and brought to the jail against her will. As such, the jury's verdict was not based upon substantial evidence and the judgment of conviction must be vacated.

CONCLUSION

Ms. Gneiting respectfully requests this Court vacate her judgment and remand this case to the district court with instructions to enter a judgment of acquittal for possession of contraband within a jail.

DATED this 18th day of September, 2019.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of September, 2019, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF, to be served as follows:

KENNETH K. JORGENSEN
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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

SJC/eas