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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 46781-2019**
Plaintiff-Respondent,	)	
	)	**Bonneville County Case No.**
v.	)	**CR-2018-815**
	)	
NICOLE LYN GNEITING,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Nicole Lyn Gneiting appeals her conviction by a jury for introducing, or attempting to introduce, major contraband (methamphetamine) within a correctional facility.

Statement Of The Facts And Course Of The Proceedings

On the early morning of January 2018, Idaho Falls Police Officer Kevin Goms was dispatched to a Motel 6 that had a possible vehicle burglary in progress. (Tr., p.169, L. 21 – p.170, L.13.[1]) When he arrived, Officer Goms heard an alarm going off from the vehicle, and saw a male, shortly thereafter identified as Kerry Lunt, standing near the front of the car, and Gneiting in the back seat of the car. (Tr., p.170, L.22 – p.171, L.9.) Lunt initially refused to identify himself, then said his name was "Dave." (Tr., p.171, Ls.15-18.) However, another officer who had arrived at the same time as Officer Goms recognized Lunt, and Lunt admitted his true identity. (Tr., p.170, Ls. 18-21; p.171, Ls.8-24.)

Police Officer Jamie Nunnelly was also dispatched to the "burglary-in-progress call." (Tr., p.126, L.20 – p.127, L.12.) When she arrived, she saw the other two officers talking to Lunt and Gneiting, "in front of the vehicle that fit the description that was possibly being burglarized." (Trial Tr., p.128, Ls.1-9.) Gneiting said she was not staying at the motel, but she was visiting a friend named Sarah. (Tr., p.128, L.22 – p.129, L.4.) Officer Nunnelly explained that the entire situation was suspicious:

> They were in a parking lot at – it was around 5:30, 5:40 in the morning – saying they were visiting a friend, not being forthcoming about the information. There was information that was provided to me by Officer Reed, with his conversation with Kerry, that was conflicting with what

[1] Citations to the transcript are to the page numbers of the electronic file of "Transcript Record Volume 1.pdf."

> Nicole was telling us. And it just – it was extremely suspicious, causing us to feel more investigation needed to be done to make sure no criminal activity was occurring.

(Tr., p.129, L.19 – p.130, L.3.)

Officer Nunnelly noticed a cylinder object inside Gneiting's pants, and when asked to remove it, Gneiting pulled a flashlight out. (Tr., p.130, Ls.4-16.) Gneiting consented to a pat search of her person, and when Officer Nunnelly "came up on the inside of her thigh, right when it reaches – where it stops, pretty much – where it stops is where [she] felt a hard, bulgy object." (Tr., p.130, L.19 – p.131, L.13.) Gneiting claimed it was "a sanitary napkin or a pad[,]" and that "she had a heavy period and was really uncomfortable." (Tr., p.131, L.25 – p.133, L.19.) Gneiting tried to adjust her pants and the object inside it, and, despite being told by the officer to not do that, Gneiting continued to do so and began yelling at Lunt that he should stop talking to the other officer. (Tr., p.133, L.25 – p.135, L.8.) Officer Nunnelly handcuffed Gneiting and placed her in the back of the patrol vehicle because she would not stop yelling at Lunt and continued "messing with her pants." (Tr., p.135, Ls.15-24.)

Lunt gave Officer Reed a key to a motel room, and when asked about it, Gneiting said she was not staying in that room and she did not have anything in it. (Tr., p.137, Ls.5-15.) When officers went to the motel room and knocked on the door, the woman who answered was arrested because she had active warrants and provided false information to the officers. (Tr., p.137, L.22 – p.138, L.23.) Upon searching the motel room, the officers found a purse with a debit card belonging to Gneiting, two bags of "leafy green substance" believed to be marijuana, a pipe, alligator clips, pills in the purse (Xanax and Adderall), multiple small zip-loc baggies, a scale, and empty syringes. (Tr., p.139, L.22 - p.140, L.19;

p.174, L.10 – p.175, L.18.) Although Officer Nunnelly was specifically searching for signs "of a female being on her menstrual cycle[,]" the "only thing [she] found was an unused pad and a shower kit," noting, "when . . . you have a heavy menstrual period, you keep multiples on you." (Tr., p.140, L.23 – p.141, L.8.)

Officer Nunnelly read Gneiting her Miranda warnings, and Gneiting confirmed that she owned some of the items found in the room. (Tr., p.141, L.24 – p.142, L.11.) Officer Nunnelly arrested Gneiting for possession of drug paraphernalia, possession of a controlled substance, and illegal possession of prescription medication. (Tr., p.143, Ls.2-9.) Because Officer Nunnelly "adamantly believed [Gneiting] had something on her[,]" the officer asked her multiple times if she had anything illegal on her person; each time, Gneiting denied having anything illegal on her. (Tr., p.143, L.14 – p.144, L.2.) When Officer Nunnelly informed Gneiting that "if she had anything illegal on her person, if she took it into the jail, that would receive an additional charge[,]" Gneiting continued to deny that she had anything on her. (Tr., p.144, Ls.3-10.)

As Officer Nunnelly drove Gneiting to the county jail, Gneiting continued to mess with what was in her pants by lifting her entire back and putting her hands into the back of her pants, despite being told multiple times not to do that. (Tr., p.144, L.11 – p.145, L.8.) Upon arrival at the jail, Gneiting got out of the patrol car in an odd manner which suggested to the officer that Gneiting was trying to "keep her buttocks clenched." (Tr., p.145, L.19 – p.146, L.5.) At that point, Officer Nunnelly handed Gneiting over to Sergeant Lindzie Klucken, and advised her that she believed Gneiting had narcotics on her. (Tr., p.147, Ls.1-11.)

Sergeant Klucken asked Gneiting if she had anything illegal on her, and Gneiting said she did not. (Tr., p.208, Ls.21-24.) After conducting a pat-down of Gneiting, Sergeant Klucken tried several times to convince Gneiting to cooperate with a strip search, but she would not comply. (Tr., p.211, L.5 – p.212, L.4.) After Deputy Cynthia Ojeda was called to assist in the strip search, the officers again were unsuccessful in getting Gneiting to comply. (Tr., p.213, Ls.3-14.) As the female officers attempted to remove Gneiting's pants, she squatted down and started to scream. (Tr., p.213, Ls.23-25.) Sergeant Klucken saw a white envelope, and when she tried to grab it, Gneiting put it between her legs momentarily, but Deputy Ojeda was able to pull it out from Gneiting's legs. (Tr., p. 214, L.6 – p.215, L.17.) The white envelope contained three plastic baggies that were subsequently determined to contain 31.41 grams of methamphetamine. (Tr., p.191, L.23 – p.193, L.7; p.214, L.9 – p.215, L.13; p.217, Ls.3-19; p.274, Ls.11-21; p.277, Ls.6-11.)

The state charged Gneiting with (1) felony possession of a controlled substance (Adderall), (2) trafficking in methamphetamine (28 grams to less than 200 grams), (3) possessing[2] major contraband (methamphetamine) (*see* I.C. §§ 18-2510(5)(c)(i), 37-2701(e)) within a correctional facility, (4) misdemeanor possession of marijuana, (5) misdemeanor possession of a controlled substance (Xanax), and (6) possession of drug paraphernalia. (Amended R., pp.36-38.) Prior to trial, Count I, felony possession of a controlled substance (Adderall) was dismissed upon the state's motion. (R., pp.113-116.)

[2] The State's Proposed Jury Instructions, and Jury Instruction No. 24 given by the district court, listed the third element of the offense as "the defendant Nicole Lyn Gneiting knowingly *introduced* or attempted to *introduce* major contraband within a correctional facility[,]" which reflects the language of I.C. § 18-2510(3)(a). (Amended R., pp.95, 157 (emphasis added).)

At trial, a jury convicted Gneiting on Count II (trafficking in methamphetamine), Count III (introducing, or attempting to introduce, methamphetamine within a correctional facility), Count V (misdemeanor possession of Xanax), and Count VI (possession of drug paraphernalia). (R., pp.166-167, 179.) The district court sentenced Gneiting to ten years with three years fixed on Count II (trafficking), two years with one year fixed on Count III (introducing, or attempting to introduce, methamphetamine within a correctional facility) – consecutive to Count II; and 30 days on Counts V and VI (both concurrent with Count II). (Amended R., pp.179-182.) Gneiting filed a Rule 35 motion to reduce her sentence. (Amended R., pp.177-178.) After a hearing, the district court granted Gneiting's motion in part by modifying the sentence on Count III to two years with $1^1/_2$ years fixed. (Amended R., pp.185-186, 189-192.) Gneiting timely appealed from the Amended Judgment of Conviction. (Amended R., pp.193-197, 202-208.)

ISSUE

Gneiting states the issue on appeal as:

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

(Appellant's Brief, p.5.)

The state rephrases the issue as:

Was there substantial evidence to convict Gneiting of introducing, or attempting to introduce, major contraband into a correctional facility?

ARGUMENT

There Was Substantial Evidence To Convict Gneiting Of Introducing, Or Attempting To Introduce, Major Contraband Into A Correctional Facility

A. Introduction

Gneiting contends that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that she "'knowingly introduced' (or attempted to introduce) the methamphetamine 'within a correctional facility'" because "the evidence showed that [she] was arrested and forcibly brought into the jail with the envelope containing methamphetamine still in her pants. Thus, the State failed to present any evidence [she] voluntarily acted to introduce methamphetamine into the jail." (Appellant's Brief, p.8 (record citation omitted).)

Gneiting's argument fails. After her arrest and before entering the jail, Gneiting refused several requests by officers to turn over anything illegal on her person, therefore, there was sufficient evidence showing that she knowingly introduced, or attempted to introduce, methamphetamine into the jail. Additionally, Gneiting cannot show any Fifth Amendment violation by having to choose between turning the methamphetamine over to the officers, or risk an additional charge if it was found on her person upon entering the jail facility. (*See* Appellant's Brief, p.2 n.2.)

B. Standard Of Review

"This Court 'will uphold a judgment of conviction entered upon a jury verdict so long as there is substantial evidence upon which a rational trier of fact could conclude that the prosecution proved all essential elements of the crime beyond a reasonable doubt.'" State v. Kralovec, 161 Idaho 569, 572, 388 P.3d 583, 586 (2017) (quoting State v.

Severson, 147 Idaho 694, 712, 215 P.3d 414, 432 (2009)). This Court "view[s] the evidence in the light most favorable to the prosecution in determining whether substantial evidence exists" and "will not substitute [its] own judgment for that of the jury on matters such as the credibility of witnesses, the weight to be given to certain evidence, and the 'reasonable inferences to be drawn from the evidence.'" Severson, 147 Idaho at 712, 215 P.3d at 432 (quoting State v. Sheahan, 139 Idaho 267, 285, 77 P.3d 956, 974 (2003)). "Evidence is substantial if a 'reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven.'" Id. (quoting State v. Mitchell, 130 Idaho 134, 135, 937 P.2d 960, 961 (Ct. App. 1997) (brackets omitted)).

The construction and application of a statute presents a question of law over which the appellate court exercises free review. State v. Robinson, 143 Idaho 306, 307, 142 P.3d 729, 730 (2006); State v. Schwartz, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003).

C. The State Presented Substantial Evidence Upon Which A Rational Trier Of Fact Could Find Her Guilty Of Introducing, Or Attempting To Introduce, Major Contraband (Methamphetamine) Within A Correctional Facility

Gneiting argues that, "[b]ecause [she] 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."[3] (Appellant's Brief, pp.11-12 (emphasis original).) Contrary to Gneiting's argument, it was her own decision to retain

[3] Although "voluntariness" is not a statutory element of the offense, it appears to be inherent in the actus reus, or "act," that is required to "exist in union, or joint operation" with intent "[i]n every crime or public offense" by I.C. § 8-114. *See* Model Penal Code § 2.01(1) *Requirement of Voluntary Act* [etc.] ("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.").

methamphetamine on her person, after being given several opportunities to do otherwise, that constitutes the voluntary nature of her offense.[4] Although, as Gneiting points out, Idaho's appellate courts have not weighed in on this precise issue (id., p.1), of the states considering it, a majority adopt that rationale, which is much more compelling than the minority position.

In analyzing the issue raised by Gneiting, other states have divided the query into two parts: (1) whether the involuntary transportation of an arrestee to a correctional facility makes the possession of contraband found on the arrestee upon entry into such a facility also involuntary, and (2) whether it violates an arrestee's Fifth Amendment privilege against self-incrimination to be given the unpleasant option of either (a) turning over contraband held on their person before entering a correctional facility (and be charged with such possession), or (b) retaining the contraband and risk it being found on their person at the correctional facility (resulting in an additional charge).

1. Gneiting Voluntarily Introduced, Or Attempted To Introduce, Methamphetamine Into The Jail

Gneiting's multiple refusals to turn over the methamphetamine that was on her person to law enforcement officers upon their requests and warnings made her continued possession of the methamphetamine at the jail a voluntary act.

In Barrera v. State, 403 P.3d 1025 (Wyo. 2017), the Wyoming Supreme Court considered the issue in regard to a fact pattern similar to this case. Barrera was arrested for having an open container and given a limited search incident to his arrest. Id. at 1027. The arresting officer twice told Barrera that he would be "searched more thoroughly at the jail

[4] If, in addition to being transported to jail against her will, the officers had forced Gneiting to continue to possess methamphetamine on her person, her argument would have merit.

and that he would face additional charges if he had any drugs on him and took them into the jail[,]" and both times he said he had nothing on him. Id. "The officer similarly advised Barrera a third time while transporting him to the jail, and he again received the same response." Id. At the jail's garage, another officer read Barrera a sign advising that he would be charged with a felony if he brought any illegal substances into the jail, and when asked if he had any such items on him, Barrera said, "no." Id. Upon being searched at the jail, methamphetamine was found in Barrera's pants pocket, resulting in his being convicted of taking a controlled substance into a jail, a felony. Id. at 1028. On appeal, Barrera "invoke[d] the minority position that a defendant's presence in a jail must be voluntary to violate the statute." Id. In making its ruling, the Barrera decision explained the rationale of the majority position as follows:

> In our view, that position amounts to saying that only one of a defendant's choices is significant: if he has not chosen to be present in the jail, he is immune from the reach of the statute, no matter how firm his intent to take his drugs with him. Moreover, as an inmate, he would likewise be immunized if, after an authorized sojourn outside the facility for purposes of work or medical attention, he chose to return with drugs made available by a confederate during his release. His return to the jail would be no more voluntary than his initial entrance as an arrestee.
>
> In contrast, courts adopting the majority position focus on a choice actually made by arrestees after they have been advised that a failure to disclose they were carrying drugs prior to entering a jail would result in a felony prosecution. *See State v. Cargile,* . . . 916 N.E.2d 775 ([Ohio] 2009). In that case, an intermediate appellate court applied the minority rule. The Ohio Supreme Court reversed and remarked, "He was made to go into the detention facility, but he did not have to take the drugs with him." *Id.* ¶ 13, 916 N.E.2d at 777. *See also Taylor v. Commonwealth,* 313 S.W.3d 563, 565-66 (Ky. 2010); *Brown v. State,* 89 S.W.3d 630, 633 (Tex. Crim. App. 2002) (en banc) (arrestee's taking marijuana into jail after advice as to consequences is voluntary so long as the referenced act, omission, or possession is not accidental).
>
> In effect, those courts look to the gravamen of the subject offense, introducing or causing the introduction of controlled substances into a jail,

> and hold that so long as that conduct was a product of a voluntary choice, the defendant need not have chosen to be inside the jail. This approach is consistent with our view that, as far as intention goes, general intent crimes require proof only that the prohibited conduct was undertaken voluntarily. *Seymore v. State*, 2007 WY 32, ¶ 13, 152 P.3d 401, 406 (Wyo. 2007), *abrogated on other grounds by Granzer v. State*, . . . 193 P.3d 266 (Wyo. 2008) (citing *Reilly v. State*, . . . ¶¶ 8-9, 55 P.3d 1259, 1262-63 (Wyo. 2002)).
>
> In reviewing an Arizona statute which in part closely mirrors § 6-5-208, an appellate court criticized the minority position by explaining the conduct that was prohibited by the statute. *State v. Alvarado*, . . . 200 P.3d 1037 (Ariz. Ct. App. 2008). It first observed that the minority position rests on the infirm premise that a defendant lacks any control over his person once he has been arrested, even when he has been advised of the consequences of taking drugs into a jail and has denied having any, choosing instead to ignore the advice and commit a felony. *Id.* at 1040. The court further noted that the minority position not only ignored that the voluntary act at issue was the effectuation of that choice, but that it unjustifiably made a defendant's voluntary presence in a jail an element of the offense. By doing the latter, the minority made the statute apply only to those who were neither arrestees nor inmates. That limitation, however, did not appear in the plain language of the statute. *Id.* at 1041-42.
>
> We believe the *Alvarado* court's analysis of the Arizona statute is sound and applicable to Wyo. Stat. Ann. § 6-5-208. The clear and unambiguous wording of our statute authorizes the punishment of "a person" who "takes or passes any controlled substance ... into a jail." Taking and passing share the common function of introducing or causing the introduction of a prohibited substance into a jail, and are voluntary so long as they are the product of choice. This is the substance or gravamen of the crime for which Barrera was prosecuted, and it exists wholly independent of whether one chooses to be in a jail.
>
> Moreover, our statute places no limitation on the meaning of the word "person." The legislature gave no sign it intended to exclude arrestees and inmates from the reach of that term, but adoption of the minority position would effectively create such an exclusion under the guise of statutory interpretation. We therefore reject Barrera's position in this regard.

Barrera, 403 P.3d at 1028-1029.

Barrera's rationale, shared by the majority of states deciding the issue, rings true. An arrestee who has been given the opportunity to turn over contraband before entering a

correctional facility makes a voluntary choice to continue to possess the contraband at the risk of subsequent detection and a more severe penalty. In addition to Ohio (Cargile),[5] Kentucky (Taylor), Texas (Brown), North Carolina (Barnes), and Arizona (Alvarado) cited in Barrera (Wyoming), several other states have adopted the majority position that arrestees who are given the opportunity to turn over contraband before entering a correctional facility, commit a voluntary act by entering such facility with contraband on their person. *See* People v. Gastello, 232 P.3d 650 (Cal. 2010) ("The critical fact is that an arrestee has the opportunity to decide whether to purge himself of hidden drugs before entering the jail, or whether to bring them inside and commit a new crime[.]"); Herron v. Commonwealth, 688 S.E.2d 901, 906 (Va. App. 2010) ("[A]ppellant chose to conceal drugs on his person and then failed to disclose the drugs after being advised of the consequences of bringing drugs into the jail. Under these circumstances, we hold appellant's act of taking drugs into the jail was voluntary."); State v. Canas, 597 N.W.2d 488, 496 (Iowa 1999), *abrogated by* State v. Turner, 630 N.W.2d 601 (Iowa 2001) ("[T]he defendant in the case at bar had the

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[5] Although Gneiting cites State v. Sowry, 803 N.E.2d 867 (Ohio App. 2004) for the minority position, Appellant's Brief, p.9, the Ohio Supreme Court effectively overruled Sowry in State v. Cargile, 916 N.E.2d 775, 777 (Ohio 2009), stating:

> Cargile affirmatively concealed the drugs by stating to the arresting officer that he did not possess anything the officer needed to be concerned about, despite the warning Cargile received that if he brought drugs into the detention facility he would be committing a felony. Cargile declined opportunities to end his possession of the drugs before entering the facility. Accordingly, Cargile's possession of the drugs when he entered the detention facility was a voluntary act, and thus he was criminally liable under R.C. 2921.36(A)(2).

See State v. Barnes, 747 S.E.2d 912, 919 n.7 (N.C. App. 2013) ("We note that the Ohio Court of Appeals in *State v. Sowry*, . . . 803 N.E.2d 867 (2004), came to a contrary conclusion. However, it seems clear to us that that decision was implicitly overruled in *Cargile*.").

option of disclosing the presence of the drugs concealed on his person before he entered the jail and became guilty of the additional offense of introducing controlled substances into a detention facility."); State v. Winsor, 110 S.W.3d 882 (Mo. App. 2003) ("Whether Appellant's presence on the county jail's premises was voluntary or against his will is irrelevant for purposes of determining whether he committed the offense.").

Also, similar to Barrera's interpretation of "person," *see* Barrera, 403 P.3d at 1029, there is no reasonable basis upon which to conclude that the Idaho Legislature intended the phrase "no person including a prisoner" in I.C. § 18-2510(3)(a) to be limited to persons who voluntarily enter a correctional facility. The objective of statutory interpretation is to give effect to legislative intent. State v. Pina, 149 Idaho 140, 144, 233 P.3d 71, 75 (2010); Robison v. Bateman-Hall, Inc., 139 Idaho 207, 210, 76 P.3d 951, 954 (2003). Because the best guide to legislative intent is the wording of the statute itself, the interpretation of a statute must begin with its literal words. Verska v. Saint Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011); State v. Doe, 147 Idaho 326, 328, 208 P.3d 730, 732 (2009). The words of a statute "'must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written.'" Verska, 151 Idaho at 893, 265 P.3d at 506 (quoting State v. Schwartz, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003)). "[W]here statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." Id. (quoting City of Sun Valley v. Sun Valley Co., 123 Idaho 665, 667, 851 P.2d 961, 963 (1993)).

The language of Idaho Code § 18-2510(3)(a) (emphasis added) reads:

> (3) *No person including a prisoner*, except as authorized by law or with permission of the facility head, shall knowingly:
>
> (a) Introduce, or attempt to introduce, major contraband into a correctional facility or the grounds of a correctional facility; . . .

By stating "[n]o person including a prisoner," Idaho Code § 18-2510(3)(a) plainly precludes all persons (including prisoners) from committing the prohibited acts (unless excepted by law, etc.). Applying language from Barrera here, "[t]he legislature gave no sign it intended to exclude arrestees and inmates from the reach of that term, but adoption of the minority position would effectively create such an exclusion under the guise of statutory interpretation." Barrera, 403 P.3d at 1029. By arguing that the statute does not apply to persons involuntarily entering a correctional facility, Gneiting turns the statute on its head by reading it as *excluding* all prisoners and arrestees (i.e., persons taken to jail involuntarily) from its prohibitions. This Court should reject Gneiting's extremely limited and unsupported view of what persons I.C. § 18-2510(3)(a) applies to.

Gneiting relies in large part on State v. Eaton, 177 P.3d 157 (Wash. App. 2008), which in turn relied on State v. Tippetts, 43 P.3d 455 (Or. App. 2002). (*See* Appellant's Brief, pp.8-10.) Those cases are inapposite to the legal argument presented here.

In Eaton, the defendant's sentence for possession of methamphetamine was enhanced for possessing an illegal drug "while in a county jail." 177 P.3d at 157. There is no indication that, before being searched at the jail, Eaton was given any opportunity to turn over the contraband (methamphetamine) to law enforcement. *See* Eaton, 177 P.3d at 157 ("After arresting Eaton for DUI, a police officer transported Eaton to the Clark County jail, where another officer searched him. During the search, the officer observed 'what appeared to be a plastic bag taped to the top of [Eaton's] sock.'") Instead, the decision

implies that Eaton was not given the choice of whether to turn over any contraband before he was searched. *See* id., 177 P.3d at 161 ("As his counsel notes, 'Once arrested, Mr. Eaton no longer had control over his location or over any of his possessions. That control rested with [the arresting officer] and the corrections officers at the jail.'"). Here, prior to transporting Gneiting to jail, Officer Nunnelly asked her several times if she had anything illegal on her person, to which she responded, "no." (Tr., p.143, L.14 – p.144, L.2.) The officer further explained to Gneiting that if she took anything illegal into the jail, she would receive an additional charge, but she continued to say that she did not have anything on her. (Tr., p.144, Ls.3-10.) Upon arriving at the jail, Sergeant Klucken asked Gneiting if she had anything illegal on her, and she said that she did not. (Tr., p.208, Ls.21-24.) In short, Eaton appears to not have been given any express opportunity to purge the methamphetamine from his possession prior to being searched at the jail.[6] In contrast, Gneiting was given multiple opportunities to give the methamphetamine she possessed to officers – she steadfastly chose not to do so.

Unlike Eaton, in Tippetts, the defendant was arrested, taken to jail, and asked "whether he had any knives, needles, or drugs on him that he was bringing into the jail,"

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[6] The state does not concede that the absence of a request for an arrestee to turn over contraband before entering a jail facility denies that person the opportunity to do so. As explained in State v. Barnes, 747 S.E.2d 912, 921 (N.C. App. 2013):

> [W]e also believe that a defendant who is arrested with controlled substances in his possession has options other than simply taking the controlled substances with him into the confinement facility. For example, the defendant always has an opportunity to disclose the existence of these controlled substances to the arresting officer before he ever reaches the jail. As the Ohio Supreme Court has noted, while the defendant "was made to go to the detention facility, . . . he did not have to take the drugs with him." *Cargile*, 123 Ohio St.3d at 345, 916 N.E.2d at 777.)

before being searched and found with marijuana on his person. Id., 43 P.3d at 456. Tippetts was convicted at trial of "supplying contraband" (knowingly introducing contraband into a correctional facility). Id. The Tippetts court ruled:

> [W]e hold that, when the legislature defined "voluntary act" as a "bodily movement performed consciously," it intended to require more than awareness. *It required some evidence that the defendant had the ability to choose to take a particular action. The state does not argue that there is any evidence from which a reasonable juror could find that defendant had such a choice*, and we turn to the alternative basis that the state advances for upholding the trial court's ruling.

Id., 43 P.3d at 459 (emphasis added).)

Despite the state's failure to attempt to do so, Tippetts recognizes that the state could have met the voluntariness element by presenting "some evidence that the defendant had the ability to choose to take a particular action." Id. The Tippetts decision could only have been referring to Tippetts's ability to choose whether to turn over contraband when asked by the jailer "whether he had any knives, needles, or drugs on him that he was bringing into the jail." Id., 43 P.3d at 456. Although that "ability to choose" argument was not advanced by the state in Tippetts, it is the central argument here. Rather than running counter to the jury's verdict in Gneiting's case, Tippetts supports it by acknowledging that a "voluntary act" requires "some evidence that the defendant had the ability to choose to take a particular action[,]" which is precisely what the evidence presented at trial demonstrated here. Id., 43 P.3d at 459.

In sum, there was substantial evidence to convict Gneiting for voluntarily introducing, or attempting to introduce, methamphetamine into a correction facility under I.C. § 18-2510(3)(a).

2. Gneiting's Federal And State Privileges Against Self-Incrimination Were Not Violated

Gneiting states in a footnote in the facts section of her opening brief:

> 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.

(Appellant's Brief, p.2 n.2.)

Assuming that Gneiting intends to advance the above "self-incrimination" argument on appeal, she has not presented any Fifth Amendment or Article I, section 13 issue or argument in either her issues on appeal, or the argument section of her appellate brief. (*See generally* Appellant's Brief, pp.6-13.) Therefore, Gneiting has waived this issue on appeal. *See* Schmechel v. Dille, 148 Idaho 176, 180, 219 P.3d 1192, 1196 (2009) (failure to list an issue on appeal ordinarily, under I.A.R. 35(a)(4), "eliminates consideration of the issue in the appeal; however, the rule may be relaxed where, as here, the issue is addressed by arguments contained in the body of the brief."); State v. Lee, 165 Idaho 254, ___, 443 P.3d 268, 270 (Ct. App. 2019), petition for review denied (July 9, 2019) (same); State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) (A party waives an issue on appeal if either authority or argument is lacking.).

Even if not waived, Gneiting is incorrect in asserting that, by being asked to turn over contraband prior to entering the jail, she was placed in a position so untenable that her federal and state privileges against self-incrimination were violated. The Ohio Supreme Court rejected such an argument in State v. Cargile, 916 N.E.2d 775, 777-778 (Ohio 2009), explaining:

> Cargile argues that once he was arrested, he had a constitutional right to remain silent, and if he had admitted to possessing drugs, he would have incriminated himself. However, there is no indication that Cargile invoked his constitutional privilege to remain silent and avoid self-incrimination at the time of the arrest or that he argued a violation of this right before the trial court. Cargile failed to raise this claim and has thereby waived it. *State v. Awan* (1986), 22 Ohio St.3d 120, 22 OBR 199, 489 N.E.2d 277, syllabus.
>
> Moreover, this challenge lacks merit. Cargile's argument is based on a faulty premise: that the right to remain silent and avoid self-incrimination also includes the privilege of lying or providing false responses to direct questions. Despite the several warnings the officer gave Cargile about bringing drugs into a detention facility, Cargile actively denied possessing any drugs. The constitutional right to remain silent does not confer upon a defendant the privilege to lie, *Brogan v. United States* (1998), 522 U.S. 398, 404 . . . , or the right to be protected from having to make difficult choices regarding whether to invoke the right to remain silent, *State v. Canas* (Iowa 1999), 597 N.W.2d 488, 496, overruled on other grounds by *State v. Turner* (Iowa 2001), 630 N.W.2d 601; *State v. Carr* (Sept. 26, 2008), Tenn. Crim. App. No. M2007–01759–CCA–R3–CD, 2008 WL 4368240. Thus, this constitutional protection does not apply to Cargile's conduct.

See Alvarado, 200 P.3d at 1042 ("That defendant chose not to disclose that he possessed an additional amount of marijuana on his person does not somehow absolve him of responsibility for his actions on the theory that providing him an opportunity to choose between admitting to possession of marijuana and being charged with introducing that substance into the jail violates the self-incrimination clause of the Fifth Amendment."); Herron, 688 S.E.2d at 907 (same); Gastello, 232 P.3d at 655-656; *see also* State v. Wallace, 138 Idaho 128, 130, 58 P.3d 1281, 1283 (Ct. App. 2002) ("Proceeding on a probation violation hearing prior to resolution of criminal charges arising from the same conduct does not impermissibly cause conflict between constitutional rights to due process and silence.").

Similar to the defendant in Cargile, Gneiting faced a difficult choice, but it was brought on by her own illegal conduct. The fact that she chose to repeatedly lie to the officers and risk being able to enter the jail facility with the methamphetamine undetected on her person did not violate her privilege against self-incrimination. Although she claims she was presented with the untenable choice of incriminating herself or face an additional charge of introducing, or attempting to introduce, methamphetamine into the jail, the record does not demonstrate any force or coercion was used against her. Neither the Fifth Amendment of the United States Constitution, nor Article I, section 13 of the Idaho Constitution, can be used by Gneiting to escape her criminal conduct.

CONCLUSION

The state respectfully requests this Court affirm Gneiting's conviction for introducing, or attempting to introduce, major contraband (methamphetamine) within a correctional facility.

DATED this 5th day of December, 2019.

/s/ John C. McKinney
JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 5th day of December, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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JCM/dd