STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK, DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,

Plaintiff,

vs.

RICHARD WRIGHT,

Defendant.

Case No. **CRM 2009 25609**

MEMORANDUM DECISION AND ORDER ON APPEAL

I. PROCEDURAL HISTORY AND BACKGROUND.

Defendant Richard W. Wright (Wright) appeals from an Order of Magistrate Judge Penny Friedlander, finding him guilty of the misdemeanor violation of Idaho Code § 49-1301 (Accidents Involving Damage to Vehicle) (Tr. P. 56, Ll. 13-15), and subsequently sentencing him to a withheld judgment. The citation itself calls out a violation of I.C. § 49-1301.

The evidence establishes on the morning of December 18, 2009, Wright was the driver of an automobile which, due to icy conditions, went off of the road, struck a speed limit sign, knocked the sign down, and then reentered the roadway. Appellant's Opening Brief, p. 2. A court trial was held on March 1, 2010, in which Wright represented himself *pro se.* At the conclusion of the trial, Magistrate Judge Penny Friedlander found Wright guilty of violating I.C. § 49-1301 beyond a reasonable doubt. Tr., p. 56, Ll. 13-15.

Following the conviction, Judge Friedlander inquired whether Wright was prepared to proceed to disposition, and Wright requested additional time to consult with an attorney for appeal. The precise dialogue was as follows:

> Q. [the Court] So at this time I do find for the State beyond a reasonable doubt. Mr. Wright, do you wish to proceed to disposition today or would you like to wait and have me set this?
> A. [Mr. Wright] I would request time to consult with an attorney for an appeal.

Tr., p. 57, Ll. 11-14. The deputy prosecutor for the State then stated: "because this is somewhat of an unusual case, but I really don't think that uh, there's really any need to have any delay on sentencing." Tr., p. 58, LL. 11-13. The State indicated on the record it would recommend a withheld judgment, with which the Court agreed. Tr., p. 58, Ll. 3-4; p. 59, Ll. 2-3. After explaining what a withheld judgment is, the Court withheld judgment for a period of one year, setting certain conditions. Tr., p. 63, Ll. 3-16.

Wright filed his Notice of Appeal on April 9, 2010, setting forth the question of whether I.C. § 49-1301 is applicable to single-vehicle collisions between a driver's vehicle and a fixture where the driver failed to remain on the scene. Notice of Appeal, p. 2, ¶ 3(a)(1). Wright filed his opening brief on July 28, 2010, one day late pursuant to the Notice of Settling Transcript on Appeal and Briefing Schedule filed June 22, 2010. Wright argued the State failed to prove each essential element to the charged violation and that he was denied his Sixth Amendment right to counsel in light of the Court's explaining a withheld judgment. Appellant's Opening Brief, pp. 7-14. On August 12, 2010, the State timely filed its Memorandum Opposing Appellant's Opening Brief. On September 5, 2010, Wright timely filed his Reply Brief. After that, neither Wright nor the State noticed the matter for argument on appeal pursuant to I.C.R. 54.16. On March 1, 2011, this matter was noticed-up by this Court for oral argument on May 10, 2011. Oral argument was held on May 10, 2011, and the Court took the matter under advisement.

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II. STANDARD OF REVIEW.

Appeals from the magistrate's division shall be heard by the district court as an appellate proceeding unless the district court orders a trial *de novo*. Idaho Criminal Rule 54.2. Where a district court acts in an appellate capacity on an appeal taken from the magistrate's division, and a further appeal is taken, appellate courts review the record independently of, but with due regard for, the decision of the district court. *State v. Bailey,* 117 Idaho 941, 942, 792 P.2d 966, 967 (Ct.App. 1990). In reviewing claims of violations of constitutional rights, appellate courts defer to factual findings not found to be clearly erroneous, but exercise free review of whether constitutional requirements were met. *State v. Anderson,* 140 Idaho 484, 488, 95 P.3d 635, 639 (2004) (citing *State v. Weber,* 116 Idaho 449, 776 P.2d 458 (1989)).

> On appeal, where a defendant stands convicted, the evidence is viewed in the light most favorable to the prosecution and the reviewing court is precluded from substituting its judgment for that of the jury as to the credibility of witnesses, the weight of the evidence and the reasonable inferences to be drawn from the evidence.

State v. Allen, 129 Idaho 556, 558, 929 P.2d 118, 120 (1996) (quoting *State v. Gardiner,* 127 Idaho 156, 163, 898 P.2d 615, 622 (Ct.App. 1995)). A judgment of conviction will not be overturned on appeal when substantial and competent evidence, though it may be conflicting, supports the judgment. *State v. Warner,* 97 Idaho 204, 206, 541 P.2d 977, 979 (1975) (citing *State v. Shannon,* 95 Idaho 299, 303, 507 P.2d 808, 812 (1973).

In general, the failure to raise an issue before the trial court waives that issue for purposes of appeal. *State v. Lenon,* 143 Idaho 415, 417, 146 P.3d 681, 683 (Ct.App. 2005), *citing State v. Fodge,* 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). However, in the case of fundamental error in a criminal case, we may consider the issue even though no objection was made at time of trial. *Id., citing State v. Haggard,* 94 Idaho 249, 251, 486 P.2d 260, 262 (1971).

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III. ANALYSIS ON APPEAL.

A. WRIGHT DID NOT RAISE THE ISSUE OF LACK OF PROOF/PROPER CHARGING BEFORE THE MAGISTRATE.

At trial, Wright focused his argument on the witnesses had not identified him as the driver. Tr. p. 52, Ll. 6-11. Wright argued before the magistrate that "…there is not enough evidence to rule uh, 100 percent that the defendant was driving the vehicle and that somebody else could have been driving that vehicle." Tr. p. 53, Ll. 2-6. That argument ignores the fact that only one person was driving the Jeep Cherokee in question. Judge Friedlander commented on that fact. Tr., p. 54, Ll. 4-6. That argument ignores the fact that Wright eventually confessed on the phone to law enforcement. Tr. p. 36, Ll. 20-25. The citing officer, Kootenai County Sheriff Deputy Joshua J. Leyk, testified that when he confronted Wright about the accident, Wright said he was aware that he'd knocked over the sign, that he was a former law enforcement officer and that he intended to use the "self-report form" that he was familiar with. Tr. p. 36, Ll. 20-25. Judge Friedlander commented on the fact that Wright admitted to law enforcement he had knocked over the sign. Tr. p. 55, L 24 – p. 56, L. 2.

Wright's arguments on appeal are that a charge under I.C. § 49-1301 was improper and there was insufficient evidence at trial to support a conviction under I.C. § 49-1301. Wright's arguments on appeal ignore the fact that he did not raise either of those issues before Judge Friedlander at trial.

In *State v. Lenon*, 143 Idaho 415, 417, 146 P.3d 681, 683 (Ct.App. 2005), the Idaho Court of Appeals held:

> In general, the failure to raise an issue before the trial court waives that issue for purposes of appeal. *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). However, in the case of fundamental error in a criminal case, we may consider the issue even though no objection was made at time of trial. *State v. Haggard*, 94 Idaho 249, 251, 486 P.2d 260, 262 (1971). In *Rutherford*, we allowed a claim of breach of a plea agreement to be raised for the first time on appeal because "a breach of a plea bargain agreement by the state affects the voluntariness of the guilty plea and is fundamental error." *Id.* at 915, 693 P.2d at 1117.[FN3] Based on the ruling in *Rutherford*, Lenon argues that appellate review of his claim should not be barred merely because he failed to pursue it in the district court.

> FN3. The Idaho Supreme Court recently adopted *Rutherford's* reasoning in *State v. Jafek*, 141 Idaho 71, 74, 106 P.3d 397, 400 (2005).

We disagree, for fundamental error review is not necessarily appropriate where the record shows more than a mere failure to object. The prevailing definition of fundamental error in Idaho is expressed in *State v. Sarabia*, 125 Idaho 815, 818, 875 P.2d 227, 230 (1994) (quoting *State v. Knowlton*, 123 Idaho 916, 918, 854 P.2d 259, 261 (1993)):

> Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive. Each case will of necessity, under such a rule, stand on its own merits. Out of the facts in each case will arise the law.

The fundamental error doctrine is premised on the obligation to see that a defendant receives a fair trial, *State v. Lewis*, 126 Idaho 77, 80-81, 878 P.2d 776, 779-80 (1994); *State v. Haggard*, 94 Idaho 249, 251, 486 P.2d 260, 262 (1971), and is intended to remedy situations where an alleged error may have deprived the defendant of his or her constitutional right to a fair proceeding. *State v. Kuhn*, 139 Idaho 710, 715, 85 P.3d 1109, 1114 (Ct.App.2003); *State v. Reynolds*, 120 Idaho 445, 448, 816 P.2d 1002, 1005 (Ct.App.1991). The fundamental error embodied in a breach of a plea agreement may be raised on appeal in the absence of an objection at trial because, as this Court stated in *Rutherford*, "[m]ere silence or the failure to object" is insufficient to waive the fundamental rights implicated in a guilty plea. *Id.* at 915, 693 P.2d at 1117.

In this case, however, the record demonstrates that Lenon did not overlook or merely fail to object to the alleged violation of the plea agreement. Following his sentencing, Lenon moved to withdraw his guilty plea or obtain specific performance of the agreement because of the prosecutor's alleged breach. This motion establishes that Lenon was fully aware of his rights relative to the alleged breach. He subsequently withdrew this motion, however, presumably for strategic reasons, and thereby prevented the district court from addressing it. Any error remains only because Lenon elected not to pursue his challenge in the trial court-not because he or the trial court failed to recognize it prior to appeal.

If Lenon had pursued the motion to withdraw his guilty plea, the district court could have developed a record on this issue and, if the district court's ruling had then been appealed, this Court would have had the benefit of that record. Although *Rutherford* holds that claims of breach of a plea agreement may be heard for the first time on appeal, our case law also dictates that such a claim should be considered for the first time on appeal only if the record provided is sufficient for that purpose. *State v. Wills*, 140 Idaho 773, 775, 102 P.3d 380, 382 (Ct.App.2004); *State v. Jones*, 139 Idaho 299, 301, 77 P.3d 988, 990 (Ct.App.2003); *State v. Kellis*, 129 Idaho 730, 733-34, 932 P.2d 358, 361-62 (Ct.App.1997). Thus, although claims of breach of a plea agreement may be heard initially on appeal with a less-than-fully-developed record, there is a preference for a complete record developed in the trial court. Here, by raising and then abandoning the motion for a remedy for the alleged breach, Lenon

> purposefully limited the thoroughness of the record on appeal. We will not reward this tactic, referred to by the State as "forum shopping," by hearing the appeal on the intentionally limited record. Because Lenon consciously chose to prevent the trial court from addressing the alleged error, we will not consider the issue on appeal as a claim of fundamental error. It is appropriate here to apply the general rule that an appellate court "will not 'review a trial court's alleged error on appeal unless the record discloses an adverse ruling which forms the basis for the assignment of error.' " *State v. Barnes,* 133 Idaho 378, 384, 987 P.2d 290, 296 (1999) (quoting *State v. Fisher,* 123 Idaho 481, 485, 849 P.2d 942, 946 (1993)).
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> Because we find the fundamental error doctrine inapplicable to this case, we decline to consider Lenon's only claim of error. The judgment of conviction is therefore affirmed.

143 Idaho 415, 417-18, 146 P.3d 681, 683-84. While it is doubtful Wright's failure to raise these issues with the trial court were part of a purposeful limitation of the record by Wright on appeal, Wright nevertheless precluded Judge Friedlander from considering these issues at trial and developing a proper record for appeal.

As the Idaho Court of Appeals in *State v. Hadley,* 122 Idaho 728, 731, 838 P. 2d 331, 334 (Ct.App. 1992) held:

> Failure to raise constitutional and statutory issues below is a waiver of the right to raise the issues on appeal. *Whitehawk v. State,* 119 Idaho 168, 804 P.2d 341 (Ct.App.1991). An exception to this rule is triggered, however, if the issue embodies a fundamental error committed by the lower court. A fundamental error is one which so profoundly distorts the proceedings that it produces manifest injustice depriving the defendant of his fundamental right to due process. *State v. Lavy, supra.*

This Court concludes Wright failed to raise the issue of insufficient evidence at trial to support a conviction under I.C. § 49-1301, and accordingly, Wright has waived his right to hear that issue on appeal. Wright also did not raise this issue in his brief on appeal (nor did the State). At oral argument, counsel for Wright argued fundamental error was committed in that Wright couldn't have been convicted of a crime under a statute that does not apply. This Court finds that claim by Wright's counsel does not arise to a level of fundamental error. However, in order to make that determination that these issues do not arise to a level of fundamental error, this Court must examine the merits of Wright's claim of insufficient evidence.

B. WRIGHT WAS PROPERLY CHARGED WITH AND CONVICTED OF A VIOLATION OF IDAHO CODE § 49-1301.

In his opening brief, Wright argues the evidence at trial was insufficient to convict him under Idaho Code § 49-1301 (Accidents Involving Damage to Vehicle); in part because § 49-1301 does not apply to single-vehicle accidents of the type at issue here, and in part because the State failed to prove each essential element beyond a reasonable doubt. Appellant's Opening Brief, pp. 7-13. Wright argues the State failed to prove that he had any duty to report his accident and his striking the speed limit sign. *Id.*, pp. 7-8. According to Wright, this is because the State did not prove that a violation of I.C. § 49-1305 (Immediate Notice of Accidents), which requires a driver involved in an accident resulting in injury or death of anyone, or damage to property valued in excess of $1,500 to immediately notify the nearest police station or sheriff's department. *Id.*, pp. 7-11. Wright states I.C. § 49-1304 (Duty Upon Striking Fixtures Upon or Adjacent to a Highway) sets forth the duties of an individual upon striking of fixtures on or adjacent to a highway. *Id.*, pp. 7-8. Wright notes for the Court that I.C. § 49-1304 requires a fixture or other property to be legally on or adjacent to a roadway, but that the State never submitted any evidence of the speed limit signs legality *vis a vis* its location, or evidence of any injury to any person. *Id.*, p. 8. Wright wholly ignores the fact that he was not charged with a violation of I.C. § 49-1304.

Wright spends much effort pointing out that there was "no evidence of the value of damage done to the street sign". *Id.*, pp. 4, 8; Notice of Appeal, p. 2, ¶ 3. Wright seems to ignore the fact that value of the sign hit only comes into play in a violation of I.C. § 49-1405, a violation of which Wright was not charged. "Immediate notice" is required when the accident involves injury of a person, death of a person, or damage to a person over $1,500.00. Idaho Code § 49-1405 was not alleged in the present case.

A violation of Idaho Code § 49-1301 is what was charged, and it requires an immediate stop at the scene or as close as possible, and an immediate return to the scene until one has fulfilled the

requirements of law. Wright did none of these things. Thus, Wright violated I.C. § 49-1301. Wright's counsel's oral argument was that I.C. § 49-1301 sets forth no duty. Wright is false in that claim. The statute reads:

> The driver of any vehicle involved in an accident, either on public or private property open to the public, resulting only in damage to a vehicle which is driven or attended by any person shall immediately stop the vehicle at the scene of the accident, or as close as possible, and shall immediately return to, and in every event shall remain at, the scene of the accident until he has fulfilled the requirements of law.

Wright's duty was to "immediately stop the vehicle at the scene of the accident…and in every event shall remain at the scene of the accident until he has fulfilled the requirements of the law." Wright didn't stop, he kept going and he ran away from what he had done. Wright didn't remain at the scene of the accident. Wright's counsel's argument at oral argument was we don't know what the "requirements of law" were in this situation. Under I.C. § 49-1304, "Duty upon striking fixtures upon or adjacent to a highway", the driver shall take reasonable steps to locate and notify the owner or person in charge of the property of the fact. Wright was not charged with a violation of I.C. § 49-1304, but in any event, Wright did not do the things that are required under that statute. So, if that statute was tried by agreement by the parties, then Wright is guilty of violating that statute as well. Wright never stopped. Wright went to work and told no one of what happened. In fact, when Deputy Leyk and Deputy Mehan contacted Wright's wife and watched Wright's wife call Wright at work (Tr. p. 25, L. 17 – p. 27, L. 4), Wright told his wife he'd hit the sign and knocked it down (Tr. p. 34, Ll. 14-18), and then Deputy Leyk got on the phone and Wright told Deputy Leyk the same thing over the phone. Tr. p. 35, L. 25 – p. 36, L. 18. However, when Deputy Leyk arrived at Wright's work, Wright changed his story and lied to Deputy Leyk. Deputy Leyk testified:

> Mr. Wright denied have – having any involvement in driving the vehicle at the time of the accident. He told me had had been advised his vehicle had been in an accident, but – and would not say who was driving the vehicle at the time.

Tr. p. 42, Ll. 1-7. There is simply no way Wright took "reasonable steps" under I.C. § 49-1304, to notify the owner of the sign when he fled the scene, stayed at his business, and then changed his story to Deputy Leyk; thus, there is no way Wright "fulfilled the requirements of law" under I.C. § 49-1301. If Wright is a former law enforcement officer, as he told Deputy Leyk, Wright does little to uphold the reputation of those sworn to serve and protect by subsequently lying to Deputy Leyk.

Counsel for Wright, without any legal citation, makes the following claim: "The driver of a vehicle involved in a collision not involving injury or death and which does not involve damage to property of any person in excess of $1,500.00 has no legal duty to report the accident to law enforcement." Appellant's Opening Brief, p. 8. Perhaps the reason there is no citation to any legal authority is there is no legal authority that would support such a claim. Such an unsubstantiated claim is not supported by a plain reading of I.C. § 49-1301 and I.C. § 49-1304.

Wright cites to *Munns v. Swift Transportation Co.*, 138 Idaho 108, 111, 58 P.3d 92, 95 (2002), for the proposition that I.C. § 49-1301 does not apply to cases in which there is only minor damage to the driver's vehicle and to personal property. *Id.*, pp. 10-11. *Munns* was a negligence case in which the truck driver for Swift Transportation Co. hit and killed horse on Highway 20 between Rexburg and Idaho Falls, Idaho, and kept going, the dead horse being left in the highway. Munns came along later when it was dark and rainy, and hit the horse in the middle of the road, and Munns was seriously injured. 138 Idaho 108, 109, 58 P.3d 92, 93. The Idaho Supreme Court held the negligence per se instruction should not have been given to the jury because "…I.C. § 49-1301 cannot be held to define conduct that would give rise to negligence per se under the facts of this case." 138 Idaho 108, 111, 58 P.3d 92, 95. The basis for that decision was that I.C. § 49-1301 "directs the driver of any vehicle involved in an accident to immediately stop and to remain at the scene until he has fulfilled the requirements of law." *Id.* The Idaho Supreme Court noted the purpose was "presumably to allow information concerning the accident." *Id.* Wright argues the

following quote from the Idaho Supreme Court in *Munns* helps his argument: "In the case before us, where the property damage caused by the accident was to the front bumper of Swift's truck and to a runaway horse, the applicability of the statute is not obvious." *Id.* Nothing about that quote in *dicta* assists Wright. *Munns* is a negligence case. The quote from that negligence case Wright likes is *dicta*. Even in that setting, all the Idaho Supreme Court said was "the applicability of the statute is not obvious." The Idaho Supreme Court did not find the statute not applicable, unconstitutional or invalid. The actual *reason* (not the *dicta*) the Idaho Supreme Court found it error to give a negligence *per se* instruction based on I.C. § 49-1301 was:

> Moreover, a second, subsequent accident with the then dead horse was not the harm sought to be prevented by the statute. Thus, because the four-part test of *Sanchez v. Galey* has not been met, we conclude that I.C. § 49-1301(1) cannot be held to define conduct that would give rise to negligence *per se* under the facts of this case. We hold that Instruction 31 should not have been given to the jury.

Id. Time and time again at oral argument, counsel for Wright made the following argument: "So what is the difference between a semi-truck and a horse, and a SUV and a street sign?" There are a lot of differences. First of all, this is a criminal matter in which Wright went off the road and struck a speed limit sign. The horse in *Munns* had to wander onto the roadway, where Wright had to wander *off* the roadway causing the accident breaking a governmental entity's street sign. Wright caused this accident. In doing so, Wright violated I.C. § 49-1301.

Wright then argues the State failed to prove each essential element of the crime charged beyond a reasonable doubt. *Id.*, pp. 12-13. Wright states no evidence was introduced at trial that the speed limit sign was on public property or property open to the public, or that the accident here involved damage beyond that to the driver's (Wright's) vehicle. *Id.*, p. 12. Wright contends I.C. §§ 1301 and 1302 (Duty to Give Information in an Accident Involving Damage to a Vehicle) must be read in conjunction and, when so read, indicate they apply only to accidents involving something other than a single-vehicle collision with private property. *Id.*, p. 13. This is a recurring theme for

Wright. He wants at times I.C. §§ 49-1302, 49-1303, 49-1304 and 48-1305 to all be grafted on to I.C § 49-1301 when all Wright was ever charged with and was tried upon, was violating I.C. § 49-1301.

The State responds it exercised its prosecutorial discretion in charging Wright under I.C. § 49-1301, irrespective of the factors in § 49-1305 not being present. Memorandum Opposing Appellant's Opening Brief, pp. 3-4. "…[T]he criminal charge of leaving the scene of an accident is a [sic] different from the failure to locate and notify the owner of fixtures upon or adjacent to a highway." *Id.*, p. 4. The State goes on to argue *Munns*' inapplicability to this case in light of its focus on negligence, not on whether a defendant had committed the elements of the charge of leaving the scene of an accident. *Id.*, p. 5. The State points to the trial record showing witnesses had personally observed Wright's vehicle slide off the public road and strike the speed limit sign adjacent to the public road, and to Judge Friedlander's finding of the location element beyond a reasonable doubt. *Id.* The State disagrees with Wright's contention, that I.C. § 49-1301 is clarified by § 49-1302, arguing that the two subsections contemplate different penalties. *Id.*, pp. 5-6. Finally, the State points the Court to evidence in the record of damage to Wright's vehicle. *Id.*, p. 6.

In his response, Wright again argues § 49-1301 does not contemplate cases in which damage results only to the driver's vehicle. Appellant's Reply Brief, p. 3.

> …[T]he statutory phrase 'resulting in only damage to a vehicle which is driven or attended by a person' does not include the vehicle driven by the driver who had the duty to provide information. There is no utility in remaining at the scene of an accident to provide information to yourself.

Id. The plain language of § 49-1301 does not limit its application to the exchange of identification and insurance information. Indeed, that is not discussed at all in the statute. Wright goes on to reiterate his earlier argument that the Court should not reach the question of whether § 49-1301 applies to the facts of this case in light of the State's failure to prove each essential element at trial. *Id.*, p. 4.

Again, Idaho Code § 49-1301 reads in part:

> The driver of any vehicle involved in an accident, either on public or private property open to the public, resulting only in damage to a vehicle which is driven or attended by any person shall immediately stop the vehicle at the scene of the accident, or as close as possible, and shall immediately return to, and in every event shall remain at, the scene of the accident until he has fulfilled the requirements of law.

I.C. § 49-1301(1). Any failure to stop or to comply with the Code "shall" amount to a misdemeanor. I.C. § 49-1301(3). A conviction under subsection (1) of § 49-1301, "shall" result in a one-year revocation of driving privileges. I.C. § 49-1301(4).

Statutory construction begins with consideration of the plain language of the statute. *State v. Rhode,* 133 Idaho 459, 462, 988 P.2d 685, 688 (1990) (Where statutory language is plain and unambiguous, Courts give effect to the statute as written without engaging in statutory construction.) Statutes are to be given their plain, obvious, and rational meaning. *State v. Burnight,* 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). Here, § 49-1301 plainly and unambiguously requires the driver of *any* vehicle involved in an accident on public property, or private property open to the public, and resulting in damage to *a* vehicle, driven or attended by *any* person, to immediately stop and remain at the scene. The term "accident" is further defined at I.C. § 49-102(3): "'Accident' means any event that results in an unintended injury *or property damage* attributable directly or indirectly to the motion of a motor vehicle…" I.C. § 49-102(3) (emphasis added). Wright's argument is simply wrong. The language of I.C. § 49-1301 does not limit the resulting damage to be applicable only if damage results to only *another* vehicle as Wright argues. Had the legislature written I.C. § 49-1301 such that it is violated where damage results to a vehicle "driven or attended by *another* person", Wright's position may have been tenable. However, I.C. §49-1301 does not read that way. One of the underlying purposes of this breadth may well be to ensure drivers involved in any accident are not under the influence of intoxicating substances. States have traditional police powers to define criminal law and protect the health, safety and welfare of citizens. *Gonzales v. Raich,* 545 U.S. 1, 66, 125 S.Ct. 2195, 2234 (2005) (citing *Brecht v. Abrahmson,* 507 U.S. 619, 635, 113 S.Ct. 1710

(1993); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719, 105 S.Ct. 2371 (1985)). The Code utilizes a broad approach, referring to *any* vehicle involved in *any* event causing injury or property damage. I.C §§ 49-1301(1), 49-102(3).

As argued by the State, the evidence at trial demonstrated Wright was in a vehicle accident, and caused property damage to a fixture in addition to damage to his own vehicle. *Munns*, while being the one case to discuss I.C. § 49-1301 in any detail, involved the question of whether a jury had been properly instructed as to a driver's duty when involved in an accident between a single vehicle and an animal. 138 Idaho 108, 110, 58 P.3d 92, 94. The outcome in *Munns*, that § 49-1301(3) does not define conduct which would be negligent *per se*, (in part because the statute was not intended to prevent the harm of an accident with an already-dead horse to a second driver (Munns), who strikes a horse left dead in the roadway by a first driver (Swift Transportation)), has no direct application to the facts now before the Court.

But, although Wright's argument about the applicability of I.C. § 49-1301 must fail, the Court will briefly discuss I.C. § 49-1304, the only one of the several additional statutes Wright wants to bring into this appeal which *might* apply. A question remains whether each essential element of the crime charged was proven. Idaho Criminal Jury Instruction 1038 (used for violations of I.C. § 49-1304) reads:

> In order for the defendant to be guilty of Leaving the Scene of an Accident [Involving Fixtures], the state must prove each of the following:
> 1. On or about [date],
> 2. in the state of Idaho,
> 3. the defendant [name] was driving a motor vehicle
> 4. which was involved in an accident resulting in damage to fixtures or other property legally upon or adjacent to a highway,
> 5. the defendant had knowledge of the accident, and
> 6. the defendant failed to do all of the following:
> a. take reasonable steps to locate the owner or person in charge of the property;
> b. notify such person of the accident, the defendant's name and address, the name of the defendant's insurance agent or company if the defendant had automobile liability insurance, and the motor vehicle registration number of the vehicle the defendant was driving; and

c. exhibit [his] [her] driver's license, if it was available and the defendant was requested to exhibit it.

If any of the above has not been proven beyond a reasonable doubt, you must find the defendant not guilty. If each of the above has been proven beyond a reasonable doubt, then you must find the defendant guilty.

ICJI 1038. In her factual findings, Judge Friedlander noted: on December 18, 2009, two witnesses observed a Jeep Cherokee slide and strike a speed limit sign on an icy day (Tr., p. 53, Ll. 11-20); according to both witnesses, only the driver was in this Jeep Cherokee (Tr. p. 54, Ll. 1-6), law enforcement traced the vehicle to Wright based on the witness' license plate report and corroborating evidence at the scene (Tr., p. 54, Ll. 7-23); law enforcement contacted Wright's wife at their residence, she telephoned Wright, and Deputy Leyk spoke with Wright (Tr., p. 55, Ll. 11-23); Wright informed the deputy that he had been in an accident, having slipped on ice and knocked over a traffic sign, and that he was going to "self-report" the accident (Tr., pp. 55-56, L. 25, Ll. 1-2); and that when law enforcement went to Wright's business/place of employment, they observed damage to the vehicle which matched debris found at the scene, but Wright at that point denied being the driver (Tr., p. 56, Ll. 4-12).

This Court is to view the evidence in the light most favorable to the prosecution and not substitute its judgment for that of Judge Friedlander as to credibility and weight. *See State v. Allen*, 129 Idaho 556, 558, 929 P.2d 118, 120. Judge Friedlander was presented with evidence that, on December 18, 2009, in the State of Idaho, Wright was the driver of a vehicle which was involved in an accident, knocking down a speed limit sign on Nita Ave., Wright knew he struck the sign, and Wright failed to stop or make any of the notifications contemplated in ¶ 6 of ICJI 1038. There exists substantial evidence supporting each essential element of the crime charged *and* the crime most applicable which was not charged. Even considering Wright's theory that I.C. § 49-1301 does not define what the "requirements of the law" are, I.C. § 49-1304 would be the most applicable, and Wright fails under that statute as well.

C. WRIGHT'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS NOT VIOLATED.

Wright's final argument is that his Sixth Amendment right to counsel was violated by the trial court's error in explaining a withheld judgment to Wright. *Id.*, p. 14.

> Because the Defendant's request for counsel was overcome by erroneous and incomplete legal advise [sic] and information provided by the prosecutor and trial court, the Defendant's waiver of his right to counsel was not knowing, voluntary or intelligent and the judgment imposed in this case should be vacated and set aside and this matter remanded for sentencing.

Id., p. 15. First of all, contrary to Wright's briefing and Wright's counsel's claims at oral argument, Wright never asked for an attorney for sentencing. As set forth above, the colloquy pertained to *appeal*. Tr., p. 57, Ll. 11-14. Even if Wright *meant* to ask for an attorney for purposes of sentencing, after such obtuse request by Wright, Judge Friedlander *three times* offered to continue sentencing to a later date. Even if this Court *could* go so far as to find that Wright invoked his right to counsel for *sentencing* (it can't), Wright subsequently changed his mind and chose to proceed to sentencing without an attorney. The State responds to Wright's argument by citing the three occasions on which Judge Friedlander offered to set disposition on a later date if Wright wished to seek the advice of counsel. Memorandum Opposing Appellant's Opening Brief, pp. 6-7. The State goes on to argue that, even if Judge Friedlander's explanation of a withheld judgment was incorrect, such error would be harmless because Wright's substantial rights were not affected. *Id.*, p. 7. The State notes a conviction under I.C. § 49-1301 requires a one-year license suspension pursuant to subsection (4) regardless of any disposition entered. *Id.*, pp. 7-8.

Wright replies his waiver of his right to counsel was not knowing, intelligent or voluntary because:

> Whether, the sentence imposed would have had differing effect if the sentencing hearing had been delayed and counsel obtained or not is of no moment to whether a substantial right of the Defendant had been affected by the way to post trial proceedings transpired.

Appellant's Reply brief, p. 6. No legal citation is given for this bald statement.

As noted by both parties, the right to counsel attaches at sentencing. In *Brown v. State,* 108 Idaho 655, 656, 701 P.2d 275, 276 (Ct.App. 1985), the Idaho Court of Appeals wrote:

> Our Supreme Court has held that Article I, § 13 of the Idaho Constitution and the sixth and fourteenth amendments to the United States Constitution entitle a defendant to representation by counsel at sentencing. *State v. [Dennis] Brown,* 98 Idaho 209, 560 P.2d 880 (1977). Thus, "in the absence of a knowing, intelligent and voluntary waiver of the right to counsel, the district court may not proceed with the sentencing hearing when the defendant is not represented by counsel without some evidence or finding that the defendant has discharged his counsel in order to delay or hinder the judicial process. *Id.,* at 212, 560 P.2d at 883.

A knowing, intelligent and voluntary waiver, in turn, requires that a defendant be made aware of the risks inherent in self-representation. *Faretta v. California,* 422 U.S. 806, 835, 95 S.Ct. 2525, 2541 (1975). The burden rests with the State to show a waiver satisfied this standard and if a defendant was deprived of the right to counsel by a trial court's acceptance of an invalid waiver, the error is fundamental. *State v. Hunnel,* 125 Idaho 623, 625, 873 P.2d 877, 879 (1994). In *State v. Jackson,* 140 Idaho 636, 97 P.3d 1025 (Ct.App. 2004), the Idaho Court of Appeals reviewed and compared cases holding that a specific warning regarding the dangers of self-representation is a prerequisite for a constitutionally valid waiver, as opposed to those cases in which a defendant need only be aware of the disadvantages of proceeding *pro se,* but did not establish a bright-line rule. 140 Idaho 636, 640-41, 97 P.3d 1025, 1029-30. The Court wrote:

> We conclude that even if judicial admonitions are not constitutionally required, Jackson's waiver here was invalid because the record does not otherwise disclose that he, at the time he chose to represent himself, appreciated the risks of proceeding pro se. Although Jackson does have a criminal record with charges dating back to 1980, and he has demonstrated some ability to file motions and perform legal research, nothing in the record indicates that he ever represented himself in previous criminal proceedings or that he had received *Faretta* warnings on a previous occasion. Nothing indicates that Jackson understood the dangers and disadvantages of self-representation when he voiced his decision to proceed pro se. The record here is insufficient to demonstrate a valid waiver of his right to counsel at trial.

140 Idaho 636, 641, 97 P.3d 1025, 1030.

Here, Judge Friedlander *began* the Court Trial by ensuring Wright was "advised of your rights including your right to a lawyer and court-appointed counsel. Is that correct?" Tr., p. 1, Ll. 8-10. Wright indicated he had been so advised. Tr., p. 1, L. 11. Wright then stated a pretrial motion for discovery had been served upon the State at the pretrial conference, but no reply had been received. Tr., p. 1, Ll. 18-22. Prior to disposition, Judge Friedlander welcomed Wright's request for additional time to "consult with an attorney for an appeal." Tr, p. 57, Ll. 13-17. Judge Friedlander also noted that, although she was inclined to withhold judgment, "if you would care to have this matter scheduled for sentencing, even though Mr. Reierson would like to go forward, I would give you the time to have it uh, set, and I think that's a fair request and frankly required at law." Tr., p. 60, Ll. 12-16. In comparing the facts of the instant matter to those present in *Jackson*, here, Wright agreed he had received *Faretta*-type warnings, he unsuccessfully attempted to file a discovery motion, and he had no criminal history. Wright stated he wished to consult an attorney about an *appeal*, not disposition following conviction, and as the instant appeal demonstrates, he has had the opportunity to do so. Tr., p. 57, Ll. 11-14. Wright's representation on appeal, and his opting to move forward with disposition in light of Judge Friedlander's willingness to set sentencing out, over the State's objection, weigh in favor of the waiver's having been constitutionally valid. This Court cannot find that Judge Friedlander accepted an invalid waiver, but rather that Wright opted not to continue the date on which disposition would take place.

Counsel for Wright argues "The trial court[']s advise also flies in the face of the United States v. Sharp, that a withheld judgment operates as a conviction in Idaho until the case is dismissed following the Defendant's successful completion of probation." Appellant's Opening Brief, pp. 14-15. First, that is not what Judge Friedlander told him. All Judge Friedlander said along those lines is "Then you could ---(inadible)…have a conviction at that point, obviously." Tr. p. 60, Ll. 2-3. Second, the citation for the case is *United States v. Sharp*, 145 Idaho 403, 179 P.3d 1059 (2008).

Third, Sharp says a convictions occurs by the verdict of a jury (in this case the verdict was by Judge Friedlander) or upon a plea of guilty, and it must precede punishment. 145 Idaho 403, 404, 179 P.3d 1059, 1060. And nothing about that fact changes the next paragraph of this Court's decision.

The most important reason there is no invalid waiver is *the outcome could not have been any different with an attorney*. Wright's main complaint seems to be with the fact that even with a withheld judgment his driver's license will be suspended (it has not been suspended yet due to the stay granted with Wright's appeal). But this license suspension occurs not due to any act of Judge Friedlander, but rather, *by the Idaho Transportation Department* due to automatic operation of the statute upon a finding of guilt. Idaho Code § 49-1301(4) reads: "The department shall revoke for a period of one (1) year the driver's license, privileges or permit to drive, or the nonresident operating privilege, of any person convicted of a violation of subsection (1) of this section." As soon as Wright was found guilty by Judge Friedlander, a license suspension by the Idaho Transportation Department occurs. That suspension occurs whether Wright received a withheld judgment on his misdemeanor conviction or a regular sentence. This license suspension is mandatory, it occurs in every single case involving a violation of I.C. § 49-1301. The fact that this license suspension occurs at the hands of the Idaho Department of Transportation is totally out of the hands of Judge Friedlander. Thus, even if Wright's right to counsel were violated, such violation is harmless error because no substantial right of Wright was affected. Wright could have assembled his own "dream team" of lawyers to appear before Judge Friedlander for sentencing, and the Idaho Transportation Department would still suspend Wright's license.

IV. CONCLUSION:

For the reasons set forth above, Judge Friedlander's conviction and sentence must be affirmed.

IT IS HEREBY ORDERED the Judgment imposed by Judge Friedlander on March 1, 2010, is AFFIRMED in all aspects. This case is REMANDED back to Magistrate Division for any further action.

IT IS FURTHER ORDERED THAT the stay entered on June 1, 2010, by this Court is RESCINDED, Wright's license is suspended immediately.

DATED this 11th day of May, 2011

_____
JOHN T. MITCHELL District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of May, 2011 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney - Richard K. Kuck
Prosecuting Attorney –
State of Idaho Transportation Department

Honorable Judge Penny Friedlander

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY:_____
Deputy