IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 18-0167

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROSS THOMAS INGMAN,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, the Honorable Holly Brown, Presiding

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STATEMENT OF THE ISSUE

Whether the district court erred in denying Appellant's motion to dismiss the felony charge of Driving Under the Influence (DUI) filed against him, based on a constitutionally infirm prior DUI conviction?

STATEMENT OF THE CASE

This is an appeal from a January 30, 2018, final judgment of the Eighteenth Judicial District Court, adjudging Appellant Ross Thomas Ingman ("Ingman") guilty of felony DUI (4th offense), a violation of § 61-8-401, MCA. (D.C. 73, Sentencing Order, attached as Ex. A). As authorized by § 46-12-204(3), MCA, Ingman pled guilty, reserving his right to appeal the district court's July 25, 2017, Order denying his Motion to Dismiss the felony charge on the basis of a constitutionally infirm predicate DUI. (D.C. 61, Order attached as Ex. B). During the July 11, 2017, hearing on the motion to dismiss, Ingman re-characterized the motion to dismiss as a motion to strike the felony enhancement of the DUI charge. (7/11/17 Hrg. Tr. at 59:17-18). The relief requested by Ingman under either designation was a dismissal of the felony designation of the offense.

The district court imposed a fine of $5,000.00 and sentenced Ingman to a 13-month commitment to the Department of Corrections (DOC) and imposed an additional two years to the DOC, suspended, following completion of a residential alcohol treatment program approved by the DOC (typically WATCH). (D.C. Doc.

73). The district court stayed execution of this sentence, without objection from the State, pending the resolution of the instant appeal. (D.C. 75). This appeal timely followed.

COMBINED STATEMENT OF FACTS AND PROCEDURE

By an Information filed March 24, 2016, the State charged Ingman with a felony DUI based on his three prior DUIs (Count I), a violation of § 61-8-401, MCA. (D.C. Doc. 3). This DUI charge was based on Ingman's act of operating his motor vehicle on March 12, 2016, heading eastbound on the frontage road parallel to Interstate I-90 between Belgrade and Bozeman, Montana. Officer Joseph Swanson stopped Ingman based on a RADD (Report a Drunk Driver) report for alleged weaving in his lane, tailgating, and otherwise driving erratically. (D.C. Docs. 1, 3). Based on his prior alcohol-related offenses, a search warrant was authorized and issued for Ingman's blood, the results of which revealed a BAC (Blood Alcohol Content) over the legal limit of 0.08.

The Affidavit of Probable Cause in support of the Information recited the following as Ingman's three prior alcohol related convictions: (1) a .08 violation out of Bozeman Municipal Court in 2007; (2) a DUI out of Bozeman Municipal Court in 2010; and (3) the conviction in dispute out of Helena Municipal Court for DUI in 2012. Notably, as discussed below, the conviction out of Helena Municipal Court was actually for a .08 violation and presumably incorrectly reported to the

Montana Central DMV records department in Helena.

Ingman filed an Omnibus Order on February 21, 2017, with notice of his intent to file a pretrial Motion to Strike a Prior DUI conviction and Dismiss the Felony Information. (D.C. 24). After an agreed upon motions deadline extension, briefs were filed and a hearing was held on July 11, 2017. (D.C. Docs. 26, 40, 52, 58). Ingman filed an opening brief containing several exhibits, including his Affidavit (Exhibit A), the minute order from the April 23, 2012 conviction showing it was actually a .08 conviction (Exhibit B), the court minutes from the December 29, 2011 arraignment and combined sentencing order (Exhibit C), and e-mail correspondence from the Helena Municipal Court clerk admitting Judge Wood's policy was to not record change of plea and sentencing proceedings despite declared a court of record in 2012 (Exhibit D). (D.C. 33). The State Responded and the Appellant Replied. (D.C. 38, 41).

At the hearing, the State presented its witnesses first. Acting Helena Municipal Court Judge Robert Wood (Judge Wood) testified that since he was the only municipal judge, he would have conducted the December 27, 2011, arraignment of Ingman and the April 23, 2012, change of plea proceedings in Ingman's case. (7/11/17 Hrg. Tr. at 5:11-7:9). Since Ingman had been arrested the night before, Judge Wood assumed he would have been shown a video advising him of his rights, but Judge Woods later admitted that since Ingman bonded out, he

would not have seen the video. (Tr. at 8:5-25; 16:25-17:21). Judge Wood testified that he does not have a specific script for advising defendants of their rights, but gives the "[t]he standard thing." (Tr. at 8:7-12). When asked which rights were included on the video, he failed to mention whether he advised defendants of their right to confront or cross-examine the witnesses against them. On follow up by counsel, he testified that "I haven't listened to it in a long time. I'm sure it's in there." (Tr. at 8:17-18).

Judge Wood noted that he checked the boxes and signed the initial advisement of rights form for Ingman after his arraignment. (Tr. at 9:10-6). There is no indication or evidence that Ingman reviewed or signed the form. Indeed, Judge Wood testified that defendants do not receive an acknowledgment of rights form. (Tr. at 19:4-7). No specific rights are included on the form signed by Judge Wood and did not include an advisory of the right to confront witnesses against him. (Exhibit C from D.C. 33) (Tr. at 10:7-14). When asked what rights he usually orally advises defendants at their initial appearance, Judge Wood testified that "all we do, I suppose" is "remind them" or their rights enumerated during the video and on the form, including the "right to call witnesses." (Tr. at 11:16-12:3).

Judge Wood testified that he advised Ingman "of his rights" during the April 23, 2012, change of plea hearing. (Tr. at 12:14-15). When asked "what rights did you advise him of that date?" he replied, "the same rights" that he advised him

during arraignment. (Tr. at 12:19-21). When pressed further, Judge Wood testified that he likely would have advised Ingman of various rights, including "the right to witnesses." (Tr. at 13:2-15). Judge Wood testified that his standard procedure before accepting a guilty plea from a criminal defendant is to advise a defendant that he is giving up certain rights:

> I don't know if we have it through waiver, but we do explain that if they plead guilty, they give up the right to a trial; they give up the right to an appeal; they give up the right to testify; as we had in the original arraignment form.

(Tr. at 14:15-15:4).

When asked during cross-examination whether he gave the "same initial rights colloquy" to Ingman that he gave at the initial arraignment, Judge Wood responded "[n]ot precisely, perhaps, but similar." (Tr. at 20:9-15).

As is evident from these excerpts of the record, the State attempted repeatedly to lead Judge Wood into testifying during the hearing that he advised criminal defendants of their right to confront and cross-examine witnesses, including Ingman, yet it is clear that Judge Wood never testified as such before the district court. However, Judge Wood did testify that he did not have a specific script of rights he read to criminal defendants, and could not recall exactly what rights he advised Ingman. And even when prompted, Judge Wood did not testify that he advised defendants, let alone Ingman, of his right to confront and cross-examine the witnesses against him.

After being corrected, Judge Wood conceded that the Helena Municipal Court became a court of record on March 1, 2010. (Tr. at 22:1-18). He testified that it was his responsibility to keep a record of all proceedings in his court, including Ingman's case. (Tr. at 23:8-25:25). Specifically, during the hearing the following question and answer session transpired between Judge Wood and defense counsel:

> Q: Now, you're aware that it's my understanding that not all proceedings, arraignments, change of pleas were recorded, once the Municipal Court became a court of record?
> A: Yes.
> Q: And whose policy was that? Who made the decisions not to record all the proceedings?
> A: I assume we all made that decision all together. I take responsibility for the decision.
> Q: So you admit that not all proceedings were recorded?
> A: I think that may be true, yes.
> Q: So what proceedings were recorded?
> A: Trials. Generally, speaking, appeals. Arguments on motions, and generally speaking pleas, as your client went through.
> Q: Now, when you say, "generally speaking," when did that policy start because you're aware there is no recording of my client's plea, correct?
> A: Policy was in effect. I have to assume that the failure to record your client was my responsibility and my fault.

(Tr. at 24:6- 25:2).

Ingman testified that he never watched a video advising him of his rights and that he was never advised of his rights prior to changing his plea. (Tr. at 34:5-3920). Specifically, he informed the district court that the April 23, 2012, hearing was "[e]xtremely informal" and that Judge Wood "did not" advise him of his right

to confront witnesses against him, of his right against self-incrimination, that he was giving up, completely, his right to go to trial, or the minimum and maximum penalties he faced by pleading guilty. (Tr. at 38:1-18). Ingman testified that "[t]here's no doubt in my mind" Judge Wood did not advise him of his rights on April 23, 2012. (Tr. at 39:16-20). He also testified that his trial attorney did not advise him of his rights before changing his plea. (Tr. at 36:12-18).

Ingman testified that had he known of his rights, specifically his right to confront and cross-examine the witnesses against him, he "absolutely[would] not" have pled guilty because he would have liked to confront the investigating officer and the lab technician since his BAC level of 0.083 was so close to the legal limit of 0.08. (Tr. at 40:1-9). "I didn't know my rights, so I pled guilty." (Tr. at 46:6). Significantly, the State did not call Ingman's attorney on the 2012 case, despite the fact that she could have testified as to their communications. *C.f. In re Gillham*, 216 Mont. 279, 282, 704 P.2d 1019, 1021 (1985) (specifying how counsel may reveal communications with the defendant).

After being questioned, *sua sponte*, by District Court Judge Holly Brown (over objection of defense counsel), regarding his memory of the change of plea hearing held on April 23, 2012, Ingman testified that he was expecting to show up for an Omnibus Hearing on that day, not a change of plea hearing, and that last-minute discussions were made in the hallway regarding the option of him pleading

to a .08 *per se* violation. Ingman testified that he was never presented a formal plea agreement in writing or a formal acknowledgement and written waiver of rights form. (Tr. at 49:1-57:16). Nor did the State present evidence of the same in order to refute or rebut Ingman's testimony.

Finding it significant that Ingman had an experienced and seasoned criminal defense attorney (Wendy Holton) representing him and got the plea benefit of a misdemeanor marijuana charge dismissed, Judge Brown denied Ingman's motion to dismiss, finding that while Ingman did meet his initial burden, Judge Wood's testimony, along with the arraignment advisement of rights form, established that Ingman likely would have been advised of his "basic rights." (Tr. at 63:2-68:9). Specifically, Judge Brown made the following ruling:

> At the change of plea, Judge Wood testified that he followed his standard procedure, which was, again, to advise of the rights. He, specifically, said that because this had been amended through a plea agreement from a second DUI to a per se second offense, and one of the drug charges was to be dismissed, that he would specifically have advised Mr. Ingman about his rights and explain what it meant to plead to the per se charge. When asked on cross-examination, by Mr. Petaja, about the Court's advisements, Judge Wood did testify that he would advise about the right to have a trial, or right to call witnesses, the right to speak or not to speak, and the right to remain silent. . . The position of the Defendant is that he was not advised, either by Ms. Holton or by Judge Wood, that he had the right to confront witnesses. Mr. Ingman indicated that if he had understood that, he would not have entered a guilty plea. However, based on the testimony of Judge Wood, the fact the Motions to Suppress and Motion in Limine had been filed . . . and then a plea was entered, pursuant to a plea agreement that included dismissal of one of the drug charges, that there was apparently a guilty plea to the possession of drug paraphernalia at the same hearing on

> April 23rd that Mr. Ingman does not have any recall about. The Court finds that the State has met it's [sic] burden to support the constitutionality of the prior conviction, including that Mr. Ingman would have been advised, both by his attorney through the discussions regarding the motions that the attorney filed on his behalf, and in conjunction with whether Mr. Ingman was willing to enter a plea to the per se charge, as well as, the possession charge, and that there was consideration provided by the State in the form of dismissal of the drug possession charge. That Mr. Ingman would have been advised of those rights, and knowingly and voluntarily waived those rights . . . The affidavit provided by Mr. Ingman indicated that he was never informed by the Court of his constitutional and statutory rights before pleading to the per se violation. However, based on the testimony of Judge Wood and State's Exhibit 1, there was an advisement provided at the arraignment of the basic constitutional rights, and Judge Wood's testimony indicated that he, again, made that advisement, and further discussed the consequences of an entry of a per se plea. That the minimum and maximum sentence would have been discussed, and the rights included his right to a trial, his right to testify or not, his right to appeal, his right to question the exhibits and evidence provided by the State. So the Court's going to conclude that based on the testimony from Judge Wood, the testimony from Mr. Ingman, State's Exhibit 1, and the records associated with the Defendant's motion, including Defendant's Exhibit B, that the conviction for driving under the influence, as a per se charge, out of Helena City Court on April 23, 2012 is constitutionally sound, and the motion to exclude that charge as a prior conviction for enhancement purposes is denied.

(Tr. at 64:22-68:7).

A written order followed July 25, 2017. (D.C. Doc. 61). As is evident from the above excerpt, and as argued below, the district court's decision was in error. Not only does the ruling lack any meaningful legal analysis, but the district court's determination that Judge Wood advised Ingman of his right to confront and cross-examine the witnesses against him is not supported by an evidence or testimony in

the record. As such, the State did not meet its burden to prove, by a preponderance of the evidence, the constitutionality of Ingman's predicate DUI in order to charge Ingman with a fourth felony DUI offense.

SUMMARY OF THE ARGUMENT

The district court erred when it denied Ingman's motion to dismiss, or alternative motion to strike, the felony DUI charge against him. Ingman met his initial burden to prove with affirmative evidence that his April 23, 2012, DUI conviction in Helena Municipal Court was constitutionally infirm as he was not advised of his right to confront or cross-examine the witnesses against him, or his right to a trial *de novo* in district court, based on the fact the municipal court proceedings were not recorded. The testimony of Helena Municipal Court Judge Bob Wood was not sufficient to meet the State's burden to prove by a preponderance of the evidence that the prior conviction was constitutionally sound. Accordingly, Ingman respectfully requests the Court to reverse the district court's denial of his motion to dismiss the felony designation and remand for resentencing on a DUI 3rd Offense.

STANDARD OF REVIEW

Whether a prior conviction may be used for sentence enhancement is a question of law that this Court reviews *de novo*. *State v. Rasmussen*, 2017 MT 259, ¶ 10, 389 Mont. 139, 404 P.3d 719 (citing State v. *Maine*, 2011 MT 90, ¶ 12,

360 Mont. 182, 255 P.3d 64). This Court also reviews *de novo* a district court's denial of a motion to dismiss in a criminal case. *State v. Seiffert*, 2010 MT 169, ¶ 10, 357 Mont. 188, 237 P.3d 669 (citing *State v. Samples*, 2008 MT 416, ¶ 13, 347 Mont. 292, 198 P.3d 803). A district court's findings of fact associated with the circumstances of a defendant's prior conviction are reviewed under a "clearly erroneous" standard. *Rasmussen*, ¶ 10 (citing *Maine*, ¶ 12). "A trial court's findings are clearly erroneous if they are not supported by substantial evidence, if the court has misapprehended the effect of the evidence, or if our review of the record leaves us with a definite and firm conviction that a mistake has been made. *State v. Weaver*, 2008 MT 86, ¶ 9, 342 Mont. 196, 179 P.3d 534.

ARGUMENT

"The Due Process Clause of Article II, Section 17, of the Montana Constitution 'protects a defendant from being sentenced based upon misinformation.'" *Rasmussen*, ¶ 12 (citing *State v. Chaussee*, 2011 MT 203, ¶ 9, 361 Mont. 433, 259 P.3d 783). "A constitutionally infirm prior conviction used for enhancement purposes constitutes 'misinformation of constitutional magnitude.'" *Chaussee*, ¶ 9 (quoting *United States v. Tucker*, 404 U.S. 443, 447 (1972)). Accordingly, it is well-established that the State is prohibited from using a constitutionally infirm prior DUI conviction to support an enhanced punishment

like a felony DUI charge or felony DUI designation. *Chaussee*, ¶ 9; *Maine*, ¶ 28; *State v. Okland*, 283 Mont. 10, 15, 941 P.2d 431, 434 (1997).

As argued below, Ingman met his ultimate burden to establish, by a preponderance of the evidence, that his prior DUI was constitutionally infirm and therefore insufficient to support a felony DUI charge. On this record, reversal and remand is justified.

I. A FELONY DUI CHARGE CANNOT BE SUPPORTED BY A CONSTITUTIONALLY INFIRM PRIOR DUI CONVICTION.

In Montana, a criminal offender's first, second, and third convictions for DUI are punished as misdemeanors. Section 61-8-714, MCA. The fourth or subsequent conviction is punished as a felony. Section 61-8-731, MCA. A rebuttable presumption of regularity attaches to a prior DUI conviction and this Court presumes that the convicting court complied with applicable law. *Rasmussen*, ¶ 14 (citing *State v. Krebs*, 2016 MT 288, ¶ 12, 385 Mont. 328, 384 P.3d 98); *State v. Howard*, 2002 MT 276, ¶ 10, 312 Mont. 359, 59 P.3d 1075 (citing *State v. Moga*, 1999 MT 283, ¶ 11, 297 Mont. 1, 989 P.2d 856 and *Okland*, 283 Mont. at 18, 941 P.2d at 436). In establishing otherwise, "the defendant has the burden to overcome the presumption of regularity by producing affirmative evidence and persuading the court, by a preponderance of the evidence, that the prior conviction is constitutionally infirm." *Rasmussen*, ¶ 14 (citing *Chaussee*, ¶ 13).

"Affirmative evidence" is evidence showing "that certain facts actually exist or, in the context of a collateral challenge, that certain facts actually existed at some point in the past." *Rasmussen*, ¶ 14 (citation omitted); *see also, State v. Snell*, 2004 MT 334, ¶ 29, 324 Mont. 173, 103 P.3d 503 ("[d]irect evidence is that which proves a fact without an inference or presumption and which in itself, if true, establishes that fact") (citing § 26-1-102(5), MCA). Circumstantial evidence is permissible, however, the evidence "must show affirmatively that [a defendant's] constitutional right was violated." *Rasmussen*, ¶ 17. While "[a]mbiguous documents" or "self-serving and conclusory inferences" are not enough to overcome the presumption of validity attached to a prior conviction, unequivocal sworn testimony by a defendant is sufficient. *Rasmussen*, ¶¶ 14, 20 (citations omitted). Additionally, "[a]n affidavit from the defendant, a witness, or court personnel attesting this sort of affirmative evidence will figure more persuasively in the calculus of whether the rebuttable presumption of regularity has been overcome than will, for example, references to unclear court minutes, judge's notes, or preprinted forms." *Rasmussen*, ¶ 18.

If a defendant satisfies his initial burden to overcome the presumption of validity, the burden then shifts to the State to rebut the defendant's evidence and prove that the prior conviction was not obtained in violation of the law or the defendant's rights. *Rasmussen*, ¶ 14; *Chaussee*, ¶ 10; *Howard*, ¶ 10; *Okland*, 283

Mont. at 18, 941 P.2d at 436); *see also, State v. Smerker*, 2006 MT 117, ¶ 36, 332 Mont. 221, 136 P.3d 543. The "ultimate burden of proof to both produce and persuade 'by a preponderance of the evidence that the conviction is invalid,'" remains with the defendant. *Rasmussen*, ¶ 14 (citing *State v. Hancock*, 2016 MT 21, ¶ 12, 382 Mont. 141, 364 P.3d 1258). The Court first adopted this approach in *Maine*, reasoning that "is consistent with that followed by the federal courts when reviewing such challenges." *Maine*, ¶ 12.

II. INGMAN ESTABLISHED THE CONSITUTIONAL INFIRMITY OF HIS PRIOR DUI CONVICTION.

The record establishes that Ingman presented sufficient direct and affirmative evidence of the constitutional infirmity with respect to whether he was advised of his constitutional and statutory rights prior to pleading guilty to the April 23, 2012, DUI, in Helena Municipal Court. While the State took some issue with the language Ingman used in his supporting Affidavit, his sworn testimony during the hearing was unequivocal that he was never advised of his right to confront the witnesses against him. Such testimony was un-rebutted by the State during the hearing.

It is true that Judge Wood testified that it was his practice to advise defendants of their basic rights, however, there is no evidence, let alone affirmative testimony by Judge Wood, that he advised Ingman, or any defendant for that matter, of his right to confront or cross-examine the witnesses against him. A

defendant's "right to witnesses" is not the same. This is especially true given that a criminal defendant must be advised by a court of his specific right to confront and cross-examine the witnesses against him before the court may accept his guilty plea. *State v. Peplow*, 2001 MT 253, ¶¶ 35-36, 307 Mont. 172, 183, 36 P.3d 922, 930 ("[b]efore accepting a plea of guilty, the trial court "must ensure the defendant understands" the right to "confront and cross-examine witnesses") (citing § 46-12-210(1)(c), MCA).

Section 46-12-210, MCA, covers in detail the "advice" that a district court must give a defendant proposing to enter a guilty plea. Specifically, § 46-12-210(1)(c), MCA, requires an advisement of the following rights: (i) to plead not guilty or to persist in that plea if it has already been made; (ii) to be tried by a jury and at the trial has the right to the assistance of counsel; (iii) to confront and cross-examine witnesses against the defendant; and (iv) not to be compelled to reveal personally incriminating information. This Court has declared that these enumerated rights must be included in any advisement to a defendant by the district court, in order to pass minimal constitutional muster. *State v. Otto*, 2012 MT 199, ¶ 18, 366 Mont. 209, 285 P.3d 583 (a district court is required to give the advice covered by § 46-12-210, MCA, and that advice is constitutionally sufficient for a voluntary plea).

In other words, a failure to advise a criminal defendant of his right to confront and cross-examine the witnesses against him is a failure of constitutional dimension. Indeed, "[b]oth the Montana Constitution, Art. II, Sec. 24, and the United States Constitution, Amend. VI, provide a defendant with the right to confront or to face the witnesses against him" the "essential purpose" of which "is to secure the opportunity to test the witness's testimony through cross-examination." *State v. Baker*, 2013 MT 113, ¶ 18, 370 Mont. 43, 300 P.3d 696 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986)).

Without advisement of such rights by a district court, a defendant cannot make a knowing and intelligent decision to relinquish his right to go to trial. *Howard*, ¶ 12 (citing *Okland*, 283 Mont. at 14, 941 P.2d at 433 and *State v. Blakney*, 197 Mont. 131, 138, 641 P.2d 1045, 1049 (1982)). Any waiver of a constitutional right must be made specifically, voluntarily, and knowingly and this Court will not engage in any presumption of waiver. *Howard*, ¶ 12 (citing *State v. Bird*, 2002 MT 2, ¶ 35, 308 Mont. 75, 43 P.3d 266 and *Park v. Sixth Jud. Dist. Court*, 1998 MT 164, ¶ 36, 289 Mont. 367, 961 P.2d 1267).

A review of this record reveals that Ingman undisputedly met his initial burden to establish with affirmative evidence the invalidity and infirmity of his predicate April 23, 2012, Helena DUI conviction. As such, he overcame the presumption of the regularity of the conviction. Because the State did not meet its

burden to rebut or prove that the conviction was not obtained in violation of Ingman's rights with evidence that Ingman was advised of his right of confrontation, Ingman met his ultimate burden to prove and persuade by a preponderance of the evidence that the conviction is invalid and constitutionally infirm. The district court's determination to the contrary is clearly erroneous and not supported by the record.

Accordingly, because this Court will not presume a waiver of a defendant's constitutional rights, and because there is no evidence whatsoever that Judge Wood, or Ingman's trial counsel for that matter, advised Ingman of his constitutional and statutory right to confront and cross-examine the witnesses against him before pleading guilty to the 2012 DUI, this Court must declare that Ingman's April 23, 2012, Helena Municipal Court DUI conviction is constitutionally infirm and insufficient to support the felony DUI charge against him in this case.

III. THIS COURT SHOULD REVERSE THE DISTRICT COURT'S DENIAL OF INGMAN'S MOTION TO DISMISS.

Since Ingman established that one of his prior DUI convictions is constitutionally infirm, it cannot support the present felony DUI charge, and the district court should have granted his motion to dismiss or alternative motion to strike the felony DUI designation. This Court should therefore reverse on this basis and remand to the district court with instructions to strike or dismiss the

felony (4th offense) DUI and convict and re-sentence Ingman on a 3rd DUI offense. Additionally, as discussed below, reversal is justified based on the fact that Ingman was not informed that he was essentially pleading guilty to an offense in a city court, not of record, and that in doing so, he was giving up his right to a *de novo* review in district court.

A defendant convicted of a criminal offense in city court which is not a court of record is entitled to a trail *de novo* in district court. Mont. Const. Art. VII, § 4(2) ("[t]he district court shall hear appeals from inferior courts as trials anew unless otherwise provided by law"). If a city elects to establish "a city court of record" it must so designate and "[t]he court's proceedings must be recorded by electronic recording or stenographic transcription, and all papers filed in a proceeding must be included in the record." Section 3-11-101(2), MCA. Section 3-6-302(1), MCA, directs that "[t]he records of the court must be kept by the clerk" and "[i]n criminal causes . . . the records must be similar to the records now kept in justices' courts." Section 3-10-502(2), MCA, provides that such records and docket entries "are prima facie evidence of the facts stated." Indeed, a record is required for an appeal to district court. *See* § 3-6-110(1), MCA; *State v. Rumley*, 194 Mont. 506, 512, 634 P.2d 446, 450 (1981) ("this Court will not consider issues which are not based upon a record to which the appellate court can look").

While the Helena Municipal Court was purportedly one of record at the time

of Ingman's April 23, 2012, DUI conviction, the proceedings were undisputedly not recorded. Judge Wood admitted this fact during the hearing. As such, had Ingman proceeded to trial in the Helena Municipal Court, and convicted, he would have had a right to *de novo* review, including a new trial, in district court. It is undisputed that he was not informed, before entering his guilty plea, that he was waiving this right.

This failure not only renders his guilty plea to the April 23, 2012, DUI, constitutionally infirm on the basis his guilty plea was not made knowingly, but it also constitutes a violation of his right to due process. This Court has recognized that absent a record of trial court proceedings, meaningful due process cannot be afforded to a criminal defendant. *State v. Davis*, 2016 MT 102, ¶¶ 21-29, 383 Mont. 281, 371 P.3d 979. This is because "the record of the proceeding provides an opportunity for a meaningful and complete judicial review." *Davis*, ¶ 21 (quoting *Canaday v. Wyoming*, 687 P.2d 897, 900 (Wyo. 1984)).

For these reasons, the district court's denial of Ingman's motion to dismiss and/or alternative motion to strike the felony designation of the DUI charge against him must be reversed.

CONCLUSION

Ingman presented sufficient affirmative evidence of the infirmity and irregularity of his prior DUI conviction so as to justify burden-shifting to the State.

As the State did not offer any direct affirmative evidence of the constitutionality of the prior conviction, this Court must conclude that Ingman met his burden to establish, by a preponderance of the evidence, the lack of sufficient valid prior DUI convictions to support a felony charge. Reversal and remand on this basis is required.

Respectfully submitted this ____ day of July, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be emailed, mailed and/or hand delivered to:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 4989 excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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CHRISTOPHER C. PETAJA

APPENDIX