

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 APPELLEE

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

APPEARANCES:

TIMOTHY C. FOX
Montana Attorney General
KATIE F. SCHULZ
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
Fax: 406-444-3549
kschulz@mt.gov

CHRISTOPHER C. PETAJA
Petaja Law
13 South Willson Ave., Ste. 3
Bozeman, MT 59715

ATTORNEY FOR DEFENDANT
AND APPELLANT

MARTIN D. LAMBERT
Gallatin County Attorney
1709 West College St., Ste. 200
Bozeman, MT 59715

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE.....1

STATEMENT OF THE CASE.....1

STATEMENT OF THE FACTS2

STANDARD OF REVIEW9

SUMMARY OF THE ARGUMENT9

ARGUMENT10

I. District court correctly concluded Ingman’s 2012 DUI conviction may be used for sentence enhancement.....10

II. The lack of a recording of the 2012 change of plea hearing did not constitute an independent ground to reverse the district court's order 17

CONCLUSION21

CERTIFICATE OF COMPLIANCE.....22

TABLE OF AUTHORITIES

CASES

<i>State v. Howard</i> , 2002 MT 276, 312 Mont. 359, 59 P.3d 1075	16
<i>State v. Anderson</i> , 2001 MT 188, 306 Mont. 243, 32 P.3d 750	16
<i>State v. Chaussee</i> , 2011 MT 203, 361 Mont. 433, 259 P.3d 783	passim
<i>State v. Davis</i> , 2016 MT 102, 383 Mont. 281, 371 P.3d 979	20
<i>State v. Hancock</i> , 2016 MT 21, 382 Mont. 141, 364 P.3d 1258	11, 14, 19
<i>State v. Hass</i> , 2011 MT 296, 363 Mont. 8, 265 P.3d 1221	20
<i>State v. Johnson</i> , 2015 MT 221, 380 Mont. 198, 356 P.3d 438	9, 11, 13, 17
<i>State v. Maine</i> , 2011 MT 90, 360 Mont. 182, 255 P.3d 64	passim
<i>State v. Nixon</i> , 2012 MT 316, 367 Mont. 495, 291 P.3d 1154	passim
<i>State v. Rasmussen</i> , 2017 MT 259, 389 Mont. 139, 404 P.3d 719	passim
<i>State v. Walker</i> , 2008 MT 244, 344 Mont. 477, 188 P.3d 1069	16
<i>State v. Wetzel</i> , 2005 MT 154, 327 Mont. 413, 114 P.3d 269	18

OTHER AUTHORITIES

Montana Constitution

Art. II, § 17.....10

STATEMENT OF THE ISSUE

Whether the district court correctly denied Ingman's motion challenging the validity of his 2012 DUI conviction.

STATEMENT OF THE CASE

Ross Thomas Ingman was charged with felony DUI in Gallatin County in March 2016, based upon 3 prior DUI convictions, including a conviction in Helena Municipal Court in 2012. (Doc. 1.) Ingman filed a motion to effectively amend the felony to a misdemeanor, alleging his 2012 conviction was constitutionally infirm. (Doc. 33.) At the completion of briefing and an evidentiary hearing, where the Helena Municipal Court Judge and Ingman testified, the district court denied the motion. (Docs. 38, 41; 07/11/17 Tr. (Tr.)) Ingman pled guilty to Felony DUI, reserving his right to appeal the court's order denying his motion. (Docs. 61-62.) At sentencing, the court committed Ingman to the Department of Corrections for a period of 13 months followed by a 3-year suspended period of commitment. (Docs. 66-67, 70-71, 72, 73, 77.) The court granted Ingman's motion to stay his sentence pending appeal. (Docs. 74, 75.)

///

///

///

STATEMENT OF THE FACTS

On March 12, 2016, Bozeman City Police Department Officer Joe Swanson responded to a reckless driving complaint about a black 4-Runner driving over the center line, on the road's shoulder, and tail-gating other vehicles. (Doc. 1.) When the officer stopped the vehicle, he identified the driver as Ingman and observed several indicators of his intoxication. (*Id.*) Ingman refused field sobriety tests and a warrant was obtained for his blood which showed his BAC was .237. (*Id.*; Doc. 38 at 2.) Ingman was charged with Felony DUI because he had three prior DUI/DUI per se convictions: February 21, 2007, Bozeman Municipal Court; September 16, 2010, Bozeman Municipal Court; and April 23, 2012, Helena Municipal Court. (Docs. 1-3.)

Ingman filed a motion to dismiss, alleging that his 2012 Helena Municipal Court DUI conviction was constitutionally infirm and, therefore, he did not have three or more prior DUI convictions. (Doc. 33.) In his motion, Ingman also argued that Helena Municipal Court's failure to record the change of plea hearing somehow made it not a court of record and claimed the court violated his constitutional rights by not advising him he had a right to a trial *de novo*. (*Id.*) The following documents were attached as exhibits to his motion: (A) Ingman's March 30, 2017 Affidavit; (B) Party Detail Summary from Ingman's Helena Municipal Court case; (C) 12/26/11 DUI citation (front) and court minutes (back);

and (D) email exchanges between Ingman's counsel and a clerk at Helena Municipal Court. (*Id.*)

The State argued that Ingman's affidavit and offer of proof were inadequate to overcome the presumption that his 2012 conviction was valid or establish he was not advised of his constitutional rights prior to pleading guilty. (Doc. 38.) The State further asserted that determination of the Helena Municipal Court's status as a court of record was not relevant or a proper issue for the Eighteenth Judicial District Court. (*Id.*) In reply, Ingman abandoned his claim about the municipal court's alleged failure to advise him of his right to a trial *de novo*, asserting only that, "the fact the Helena City [sic] Court was operating outside of the statutory requirements of a court of record is further circumstantial evidence" that his 2012 conviction was infirm. (Doc. 41.)

The court conducted a hearing on Ingman's motion on July 11, 2017, where the Honorable Bob Wood, Helena Municipal Court Judge, and Ingman testified. (Tr.) Since 2008, Judge Wood has been the only presiding judge in Helena Municipal Court, which became a court of record in 2010. (Tr. at 5, 22.) Judge Wood confirmed he presided over Ingman's DUI case. (Tr. at 6-9, 12-19; Doc. 33, Ex. B (Ex. B).) Ingman was arrested for DUI on December 26, 2011, and was later also charged with misdemeanor possession of dangerous drugs and misdemeanor possession of drug paraphernalia. (*Id.*) On December 27, 2011,

Ingman appeared in front of Judge Woods who advised him of his rights, the charges he was facing, and potential penalties. (*Id.*) A copy of Ingman's "Municipal Court Arraignment/Advisal of Rights" dated December 27, 2011, was admitted into evidence. (Tr. at 9, 13; Ex. 1.) Judge Woods agreed that he did not present defendants with an acknowledgement of rights form when they appeared before him, but testified he orally advised defendants of their constitutional rights. (Tr. at 18-19.)

Judge Woods explained that as of January 2012, Ingman was represented by Wendy Holton who, in Judge Woods' opinion, "is one of the most competent, certainly, one of the top DUI attorneys that I know." (Tr. at 13.) In February 2012, Ms. Holton filed a motion to suppress and a motion in limine that were eventually set for an evidentiary hearing on April 23, 2012. (Tr. at 12-29; Doc. 33, Ex. B.) However, Judge Woods explained that when Ms. Holton and Ingman appeared on the 23rd, Ms. Holton asked to vacate the hearing in lieu of a change of plea hearing because the City and Ingman had reached a plea agreement. (*Id.* at 13-16; Ex. B.) The agreement called for Ingman to plead guilty to an amended charge of DUI per se and the drug paraphernalia charge and the City would dismiss the drug possession charge and recommend house arrest for the DUI sentence. (*Id.*)

Judge Woods explained the nature and penalties of the amended charge to Ingman, advised Ingman of his rights again, and explained that by pleading guilty, he was giving up those rights. (Tr. at 12-29.) Judge Woods confirmed that had he diverged from his standard procedure of thoroughly reviewing all of Ingman's constitutional rights and explaining that he was waiving those rights if he pled guilty, he would have made a notation in his file and stated no such notation appeared in the record. (Tr. at 14-15, 20-21.)

Judge Woods confirmed that as the presiding judge it was his responsibility to record a proceeding and acknowledged that some hearings were not recorded. (Tr. at 24-29.) However, the judge denied that it was court policy to not record some hearings and specifically stated that trials, arguments on motions, and changes of plea hearings were supposed to be recorded. (*Id.* at 24-25.) Judge Woods testified that he believed that on April 23, 2012, he simply failed to "hit the record button." (*Id.* at 28-29.) When asked why a current clerk of court indicated to Ingman's counsel that in 2012 it was policy not to record change of plea hearings, Judge Woods stated, "I don't know, but she wasn't on the court then." (*Id.*)

Despite stating in his March 30, 2017 affidavit that he did not recall Judge Woods advising him of his rights at the change of plea hearing, at the evidentiary hearing, Ingman affirmatively reported that Judge Woods did not

advise him of his rights. (Tr. at 37-40.) Ingman had no explanation for his lack of recollection about the being advised of his rights on December 27, 2011. (Tr.) Ingman vacillated about his recollection with being informed of his rights when he pled guilty to his Bozeman City DUIs, explaining that he “was a college student [and] the matters didn’t seem that important to me.” (Tr. at 30-58.) Both the State and court noted inconsistencies about Ingman’s comments regarding his lack of concern for his first two DUI convictions given he was in college, pointing out he was also in college in 2012. (Tr. at 59-68.)

Ingman claimed that Ms. Holton never advised him of his rights, including his right to challenge the evidence, despite the fact she had filed a motion to suppress and that a police officer was present at the April 23 hearing. (Tr. at 36-37.) When asked by the court what he thought was going to happen on April 23, Ingman first claimed he thought it was an “omni” hearing where he would enter a plea and get a trial date set. (Tr. at 51.) Notably, Ingman’s DUI ticket advised his “omni” was February 1, 2012. (Doc. 33. Ex. C.) Ingman then stated he thought “procedural things” were going to take place on April 23, like scheduling other hearings. (Tr. at 52.)

Although Ingman claimed that had he known he had a right to confront witnesses from the lab that tested his blood, he would not have pled guilty, the

heart of Ingman's argument actually appeared to be that Ms. Holton was ineffective for not helping him challenge the evidence. (Tr. at 44-46.)

For instance, when asked why he would not have pled guilty if he knew he could confront witnesses, Ingman replied,

Well, my blood result was a .083. So one, I would have wanted to see the error bars on the state lab, and probably had a second opinion, or test done by a private facility. And two, I would have wanted the officer that was there during my arrest to testify what he said during the video that I was not impaired during the initial stop.

(Tr. at 39-40:1-9.) And, on cross-examination, Ingman stated that he was "mislead by my rights and what should have happened by my attorney that I had hired."

(Tr. at 45.) When asked how Ms. Holton mislead him, Ingman stated

Well, I believe that if I would have been told "We need to get a second opinion on the blood result analysis, and we need to cross-examine both of the officers that were there at the initial traffic stop for talking on the cell phone," I would not have pled guilty, whatsoever.

(Tr. at 45:15-20.) When the State then asked Ingman, "And you're saying now, you wouldn't have pled if your lawyer had advised you not to," Ingman replied "Correct," but then added, "I didn't know my rights, so I pled guilty." (Tr. at 45-46.) Ingman also explained he pled guilty because "I thought that because the blood came back .083 that that was it." (Tr. at 46.) However, earlier in his testimony, Ingman stated that when the blood test results came back "I remember that it was extremely borderline." (Tr. at 35.)

Ingman stated he did not recall a prosecutor being present at the April 23 hearing. (Doc. 33, Ex. A; Tr. at 37.) However, the Municipal Court's record indicates that the drug possession charge was dismissed by the prosecutor. (Ex. B.) During questioning by the court, Ingman stated he did not recall pleading guilty to misdemeanor possession of drug paraphernalia when he pled to the amended DUI per se count on April 23, 2012. (Tr. at 53-57.) Nor did he recall that the drug possession charge was dismissed. (Tr. at 53.) The municipal court records show Ingman pled guilty to the paraphernalia charge, and the possession charge was dismissed. (Doc. 33, Ex. B.)

The court orally pronounced its ruling following closing arguments. (Tr. at 62-68.)¹ First, the court explained that since it had concurrent jurisdiction over misdemeanors and felonies, even if one of Ingman's prior convictions was deemed invalid, the court would not dismiss the case. (*Id.* at 62.) Next, the court stated that Ingman met his initial burden to call the constitutionality of his plea into question. (*Id.* at 63.) Ultimately, however, the court denied Ingman's motion, finding that based upon Ingman's affidavit and testimony and the testimony from Judge Woods, Ingman failed to meet his burden of establishing that his 2012 conviction was constitutionally infirm. (*Id.* at 63-68.)

¹ The district court did not issue a written order. Ingman's reference to the court issuing a written order cites to the July 11, 2017 Minute Entry. (Br. at 9, citing Doc. 61.)

STANDARD OF REVIEW

This Court reviews the question of law of whether a prior conviction may be used for sentence enhancement *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 has noted, however, that “in determining whether a prior conviction is invalid, a district court may first need to make findings of fact, based on oral and documentary evidence presented by the parties, regarding the circumstances of that conviction” which will not be disturbed unless they are clearly erroneous. *Rasmussen*, ¶ 10. “A trial court’s findings are clearly erroneous if they are not supported by substantial evidence, if the court has misapprehended the effect of that evidence, or if a review of the record leaves this Court with a definite and firm conviction that a mistake has been made.” *State v. Johnson*, 2015 MT 221, ¶ 11, 380 Mont. 198, 356 P.3d 438 (citation omitted).

SUMMARY OF THE ARGUMENT

The district court did not misapprehend the effect of the evidence and its findings were supported by substantial evidence. The court correctly concluded that Ingman did not overcome his burden and produce affirmative evidence sufficient to persuade the court that his 2012 Helena Municipal Court conviction was constitutionally infirm. The district court, as the factfinder, was vested with

evaluating witness credibility and assigning corresponding weight to the evidence. The evidence supported the court's finding that Judge Woods followed his standard procedure each time Ingman appeared in front of him and advised him of his constitutional rights.

This Court need not consider Ingman's additional request for reversal, based upon Judge Woods' failing to advise him of an alleged constitutional right to a trial *de novo* because Ingman altered his argument to the district court, only relying upon the lack of record as impugning Judge Woods' credibility. As Judge Woods explained, the lack of a recording for Ingman's change of plea hearing was an operator error. The absence of the recording does not invalidate Ingman's change of plea proceedings.

ARGUMENT

I. District court correctly concluded Ingman's 2012 DUI conviction may be used for sentence enhancement.

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); *Maine*, ¶¶ 28, 33 (applying well-established principle that a constitutionally infirm conviction may not be used to support an enhanced punishment). However, "[a] rebuttable presumption of regularity

attaches to [a] prior conviction, and [this Court will] presume that the convicting court complied with the law in all respects.” *Rasmussen*, ¶ 14 (citation omitted); *Maine*, ¶ 33.

Thus, a “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); *Maine*, ¶¶ 17, 33 (defendant has the “heavy burden” to present a preponderance of affirmative evidence establishing a prior conviction is invalid); *State v. Hancock*, 2016 MT 21, 382 Mont. 141, 364 P.3d 1258; *State v. Nixon*, 2012 MT 316, 367 Mont. 495, 291 P.3d 1154; *Johnson, supra*.

“Ambiguous documents, self-serving and conclusory inferences, and forcing the State to prove the validity of the prior conviction, when such validity is already presumed, do not suffice as affirmative evidence for purposes of meeting the defendant’s burden.” *Chaussee*, ¶ 18 (citation omitted). If the defendant satisfies his burden, the burden shifts to the State to rebut the defendant’s evidence. *Chaussee*, ¶ 10. However, as this Court has clarified,

the ultimate burden of proof—which includes both the burden of production and the burden of persuasion—shall be on the defendant, who must prove by a preponderance of the evidence that the conviction is *invalid*. The burden is not on the State to prove by a preponderance of the evidence that the conviction is valid.

Maine, ¶ 34 (internal citations omitted) (emphasis in original); *Chaussee*, ¶ 12. To carry the burden of proof,

the defendant may not simply point to an ambiguous or silent record, but must come forward with affirmative evidence establishing that the prior conviction was obtained in violation of the Constitution. Self-serving statements by the defendant that his or her conviction is infirm are insufficient to overcome the presumption of regularity and bar the use of the conviction for enhancement.

Maine, ¶ 34; *Chaussee*, ¶ 12 (“ambiguous documents, self-serving and conclusory inferences” do not constitute “affirmative evidence” to overcome defendant’s burden). This Court has defined “affirmative evidence” as evidence demonstrating “that certain facts actually exist or, in the context of a collateral challenge, that certain facts actually existed at some point in the past—e.g., that an indigent defendant actually requested the appointment of counsel but counsel was actually refused.” *Rasmussen*, ¶ 14 (citation omitted).

The court found that at the April 23, 2012 change of plea hearing, Judge Woods followed his standard procedure of advising Ingman of all his constitutional rights and ensuring Ingman understood the mandatory penalties for the amended offense, DUI per se. (Tr. at 64-67.) In making its ruling, the district court rejected Ingman’s specific claim that had he known he had a right to confront witnesses, he would not have pled guilty. (Tr. at 65-66.) In support of that finding, the court noted that Ms. Holton filed a motion to suppress and motion in limine challenging evidence seized by the officers, and at the time set for the evidentiary hearing (where he

would confront witnesses) Ingman pled guilty to the amended offense of DUI per se instead of proceeding with the hearing. (*Id.*) The court found the presence of an officer at the April 23, 2012 hearing corroborated that fact. (*Id.*)

The court found that the facts supported that Ingman would have been advised of his rights by the court and his counsel prior to pleading guilty and effectively withdrawing his motions to suppress and limine. (Tr. at 66-67.) The court questioned Ingman's recollection of events, noting that he had no recollection of pleading guilty to the drug paraphernalia charge. (*Id.*) The court further questioned Ingman's recollection of events observing that he claimed no recollection of the plea agreement despite the fact he obtained consideration from the City with its recommendation for house arrest and dismissal of the drug possession charge, which Ingman also failed to recall. (*Id.*)

The court's observations about the credibility of Ingman's recollections and Judge Woods' testimony about his standard procedures were oral findings of fact "supported by substantial evidence" and the district court did not "misapprehend[] the effect of that evidence." *Johnson*, ¶ 11. The district court, as the factfinder, was responsible for weighing the evidence and determining the credibility of the testimony presented and it is not this Court's role to reweigh the evidence. *See Nixon*, ¶ 21 ("The weight of evidence and the credibility of

witnesses are exclusively within the province of the trier of fact, and we will not reweigh the evidence or the credibility of witnesses.”); *Rasmussen*, ¶ 16.

The situation presented here mirrors *Nixon, supra* (held, district court’s findings not clearly erroneous, and Nixon failed to establish his conviction was constitutionally infirm). This Court concluded that despite Nixon’s “affirmative evidence” (*e.g.*, statements in his affidavit and during the hearing), he did not satisfy his ultimate burden of proof “which includes *both* the burden of production and the burden of persuasion . . .” *Nixon*, ¶ 19 (emphasis added) (defendant merely alleging the unconstitutionality of a conviction is insufficient to rebut the presumption of validity).

This Court noted that the probative value of Nixon’s affidavit was undermined by evidence presented at the hearing. *Nixon*, ¶ 20. *Nixon*, ¶ 21; *see also Hancock*, ¶ 14 (“In light of the [City Court Judge’s] testimony, we are not convinced by Hancock’s assertions in his affidavit and testimony” that his conviction was constitutionally invalid.).

The same is true here as evidenced by the court’s observations and questions concerning Ingman’s recollection of events when contrasted against Judge Woods’ testimony that he adhered to his standard procedures of advising Ingman of his rights prior to accepting his plea. Moreover, when Ingman executed his affidavit, his counsel had confirmed that no recording of the change of plea hearing was available to counter his claims. (Doc. 33, Exs. A, D.) The record supports the

court questioning the veracity of Ingman’s claims given the inconstancies in Ingman’s testimony and recollections as well as his lack of recollection of events that occurred. This is certainly true when contrasted to Judge Woods, who had four years of experience as judge and also experience as a prosecutor.

Similar to the circumstances presented here, in *Rasmussen*, this Court explained that “Rasmussen’s affidavit and testimony could have led the court to question his credibility and the probative force of his statements.” *Rasmussen*, ¶ 16. For instance, as this Court observed, Rasmussen knew no court record was available to contradict the alleged constitutional violations, he claimed to remember some specific details (which supported his allegations) but could not recall other details, and he acknowledged having criminal history involving other jailable offenses that carried the same rights he claimed he was unaware of in 1996. *Rasmussen*, ¶ 16.

Moreover, this Court explained in *Rasmussen* that merely because a form does not demonstrate the defendant waived a specific right, it is not direct evidence that the defendant was denied that right. *Rasmussen*, ¶ 17. As this Court further explained, “the lack of evidence showing that the prior conviction is valid is not proof, by affirmative evidence, that the conviction is invalid.” *Rasmussen*, ¶ 17 (citing *Chaussee*, ¶ 13). Rasmussen’s assertion “that he did not sign a waiver of his right to counsel ‘*is not proof of anything. It is absence of proof.*’” *Rasmussen*,

¶ 18 (citing *State v. Anderson*, 2001 MT 188, ¶ 22, 306 Mont. 243, 32 P.3d 750) (emphasis added).

Just as this Court observed in *Rasmussen* and *Anderson*, Ingman’s reliance on the absence of proof (*e.g.*, acknowledgement of rights and plea agreement or recording of the hearing) is insufficient to demonstrate his conviction was constitutionally infirm because “[s]imply submitting a document that does not prove regularity does not meet this burden of showing irregularity.” *Rasmussen*, ¶ 17. Ingman’s arguments, including his claim that “there is great suspicion of what is going on in Helena Municipal Court” (*see* Tr. at 59) was not persuasive. *See Chaussen*, ¶ 24 (“That the record may be ‘suspect’ is wholly insufficient to rebut the presumption of regularity.”).

Ingman’s reliance on *Howard*, *infra* is not persuasive. (Br. at 12-13, 16.) As this Court explained, “[o]ur decision in *Maine* expressly modified the framework of analysis applied in *Howard* and *Walker* by imposing the burden on the defendant to prove by affirmative evidence that the prior conviction was constitutionally infirm. *Rasmussen*, ¶ 20 (distinguishing *State v. Howard*, 2002 MT 276, 312 Mont. 359, 59 P.3d 1075; and *State v. Walker*, 2008 MT 244, 344 Mont. 477, 188 P.3d 1069 holdings that stated defendant’s statement, “I was not advised of my rights” constituted direct evidence sufficient to establish burden).

Moreover, *Howard* was decided prior to this Court’s statement in *Maine* that to establish a prior conviction is infirm, the defendant’s burden “includes both the burden of production *and the burden of persuasion.*” *Maine*, ¶ 34. Just as in *Nixon* and *Rasmussen*, Ingman failed to persuade the district court that he had not been advised of his rights, specifically his right to confront witnesses. Tellingly, when Ingman was cross-examined about his claim he did not know he could confront witnesses, his answers described dissatisfaction with Ms. Holton, not necessarily that he had no clue about confronting witnesses. Ingman’s claim may be more accurately characterized as faulting Ms. Holton for not explaining *how* the witnesses and evidence could be challenged.

Ingman failed to meet his burden by establishing that his 2012 conviction was invalid. The district court did not misapprehend the effect of the evidence and its findings were “supported by substantial evidence.” *Johnson*, ¶ 11. The district court correctly applied the law and did not err when it denied Ingman’s motion to reduce his felony DUI to a misdemeanor.

II. The lack of a recording of the 2012 change of plea hearing did not constitute an independent ground to reverse the district court’s order

On appeal, Ingman advances the following additional ground for reversal: “[R]eversal is justified based on the fact that Ingman was not informed that he was essentially pleading guilty to an offence 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.” (Br. at 18.) However, Ingman did not maintain this issue with the trial court and, accordingly, the court did not issue any order or findings concerning whether he was denied a right to be advised of a trial *de novo*.

In his reply brief to the court, Ingman abandoned this claim by stating that “Ingman does not contend that his trial *de novo* right is at direct issue but the fact the Helena City [sic] Court was operating outside of the statutory requirements of a court of record is further circumstantial evidence that Ingman’s April 23, 2012 [conviction] is constitutionally infirm.” (Doc. 41 at 5.) At the hearing, while Ingman elicited testimony from Judge Woods about the lack of recording, he did not ask anything about advising defendants about a “right to trial *de novo*” if the recording device was not engaged by a court of record.

Thus, it is not surprising that the district court did not reference Ingram’s “right to trial *de novo*” claim. Nor did Ingman offer argument or request for a ruling on this discrete issue. Arguably, therefore, Ingman has not properly preserved this specific argument given this Court’s well-established rule that it is improper to fault a district court for issues it did not decide. *State v. Wetzel*, 2005 MT 154, ¶ 13, 327 Mont. 413, 114 P.3d 269. While it is true that Ingman suggested that he was denied advisement of a “right to a trial *de novo*” in his motion to dismiss, he specifically abandoned that argument in his reply and at the hearing. Instead,

Ingman asserted that the failure to record should be considered as evidence against Judge Woods' credibility. Under these specific circumstance, it would be unfair to reverse the district court's order based on Ingman's revived claim that the Helena Municipal Court violated its statutory duty as a court of record.

In addition, there is insufficient evidence in the record to establish that the lack of recording was a result of a court policy of not recording change of plea hearings. Judge Woods acknowledged that sometimes hearings did not get recorded, but he fully expected Ingman's change of plea hearing to have been recorded and testified that the lack of recording for the April 23 hearing was the result of "operator error."

As does happen in some court proceedings, the recording device was not initiated and, thus, no audio record of the hearing was available. This does not mean that the April 23 proceeding was therefore infirm. *See Hancock*, ¶ 13 (Court noted the prior conviction Hancock challenged was from a city court that was not a court of record at the time, so the district court had to rely on the credibility of the witnesses who were at the city court proceeding). Moreover, district court rules and rules of appellate procedure account for situations when court records are lost or destroyed. There is no assumption that standard court procedures were not followed. In fact, as this Court has consistently held, there is a presumption that courts know, and follow the law.

Finally, even if this Court considers this angle of Ingman’s appeal, his argument lacks a key logical component: nothing in the record suggested his trial, if he chose to proceed to trial, would not have been recorded. There is no such thing as a “change of plea hearing *de novo*.” Ingman’s reliance upon *State v. Davis*, 2016 MT 102, 383 Mont. 281, 371 P.3d 979, is misplaced. In *Davis*, Court considered whether a *trial* before a non-lawyer judge without a *de novo* appeal violated a defendant’s constitutional right to due process and concluded it did not. *Davis, supra* (held, no fundamental and essential right to a trial before a lawyer-judge).

First, unlike the precipitating fact raised in *Davis*, Judge Woods is a “lawyer-judge” and had also practiced as a city prosecutor prior to becoming judge. Second, the proceeding at issue in *Davis* was the *trial*, not a change of plea hearing. Ingman has not established how the lack of recording of his change of plea hearing precluded an effective appeal option to the district court. In fact, had Ingman made a timely appeal or request to withdraw his guilty plea, the parties would have been in a much better position to recreate the events of April 23, 2012.

Even if the court failed in its statutory obligation to record hearings, this Court has held that “mere statutory violation does not necessarily, in and of itself, arise to a constitutional violation.” *State v. Hass*, 2011 MT 296, ¶ 17, 363 Mont. 8, 265 P.3d 1221 (holding that even if statute directing procedure to

replace counsel should have been followed, defendant still needed to establish how his constitutional rights were violated).

At most, just as Ingman asserted in his reply brief, the court's failure to preserve a recording of the April 23 hearing could be considered circumstantial evidence related to the court adhering to its own standard operating procedures. The district court was presented with Ingman's theory about the court allegedly "choosing not to record" hearings as well as Judge Woods' explanations. It is not this Court's function to reweigh the evidence or overrule the trier of fact's assessment of witness credibility. *Nixon*, ¶ 21; *Rasmussen*, ¶ 16.

CONCLUSION

The district court's order denying Ingman's motion to invalidate his 2012 DUI conviction for the purposes of sentence enhancement should be affirmed.

Respectfully submitted this 19th day of November, 2018.

TIMOTHY C. FOX
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ Katie F. Schulz
KATIE F. SCHULZ
Assistant Attorney General

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 4,976 words, excluding certificate of service and certificate of compliance.

/s/ Katie F. Schulz

KATIE F. SCHULZ

CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-19-2018:

Martin D. Lambert (Prosecutor)
1709 W. College
Bozeman MT 59715
Representing: State of Montana
Service Method: eService

Christopher C. Petaja (Attorney)
Petaja Law
13 S. Willson, Ste 3
Bozeman MT 59715
Representing: Ross Thomas Ingman
Service Method: Conventional

Electronically signed by Wendi Waterman on behalf of Kathryn Fey Schulz
Dated: 11-19-2018