

IN THE SUPREME COURT STATE OF MONTANA

STATE OF MONTANA,

Cause No. DA-18-0574

Plaintiff/Appellee,

v.

RODNEY HOLDER,

Defendant/Appellant.

BRIEF OF DEFENDANT/APPELLANT, RODNEY HOLDER

On Appeal from the Eighteenth Judicial District Court, the Honorable Rienne

McElyea presiding.

Case No. DC-16-431

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STATEMENT OF ISSUE PRESENTED FOR REVIEW

THE DISTRICT COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION TO STRIKE PRIOR DUI WHEN THE STATE FAILED TO FIRST SHOW PROOF OF THE EXISTENCE OF A QUALIFYING CONVICTION FOR A 1990 OFFENSE FROM THE STATE OF TEXAS WHICH WAS SILENT AS TO ANY SENTENCE OR JUDGMENT.

STATEMENT OF THE CASE

On November 26, 2016, Mr. Holder was cited for driving under the influence of alcohol (DUI), a fourth or subsequent offense. (Motion to Strike Prior Offenses Defendant/Appellant's Exhibit 1). Mr. Holder challenged the State's felony enhancement of the DUI charge, arguing the State had not provided proof that he had three prior convictions for DUI to classify the current offense as a felony. *Id.* Specifically, Mr. Holder argued the State failed to produce proof of a qualified conviction for State's offered driving while intoxicated (DWI) in Texas from 1990. *Id.* The State provided only a copy of Mr. Holder's criminal record, through a National Crime Information Center (NCIC) which failed to show any disposition, sentence, or judgment for any DWI in Texas in 1990, yet the District Court used the 1990, Texas DWI to enhance Mr. Holder's current DUI to a felony offense. *Id.* The State did not provide any evidence that Mr. Holder had a qualifying conviction for DUI in Texas in 1990, which is the subject of this appeal. *Id.* Mr. Holder requests this Supreme Court hold the State to its burden of having

to prove a qualifying conviction before any burden is shifted to Mr. Holder, and reverse the District Court's ruling.

STATEMENT OF THE FACTS

On November 26, 2016, Mr. Holder was stopped by a Bozeman, Montana, police officer for an improper turn. (State's Response to Motion to Strike Prior Offenses, Exhibit 2). The officer reported he stopped Mr. Holder due to turning right onto South 19th Avenue, turning wide into the farthest southbound lane of traffic rather than the nearest southbound lane of travel. *Id.* Upon contact, Mr. Holder was subsequently arrested for felony, DUI fourth or subsequent offense. *Id.*

Mr. Holder filed a Motion to Strike Prior Offenses in District Court, arguing the State's use of a 1990, DWI out of the State of Texas was unconstitutional and should not have been used to enhance the DUI offense to a felony, as there was no conviction. (Exhibit 1, Motion to Strike Prior Offenses). Mr. Holder, in the Motion to Strike Prior Offenses, argued there was not a prior conviction for a 1990, Texas DWI.

The State responded to the Motion to Strike Prior Offenses, arguing Mr. Holder had a prior DWI conviction on January 6, 1990, out of Deaf Smith County, Texas, a DUI conviction on or about February 8, 2006, out of Spokane County, Washington, and a DUI conviction out of Grant County, Washington, on or about

February 20, 2009. (Exhibit 2, State's Response to Motion to Strike Priors). The State, also made reference to another possible DUI conviction out of Spokane County, Washington, on or about, February 20, 2009, another instance where the State did not have a conviction, judgment or disposition. *Id.* The District Court refused to use the February 20, 2009, DUI, to enhance the current offense to a felony, because the Court did not find that an "email response" from Spokane County, Washington, sufficient proof of a qualifying conviction. The District Court stated the State "failed to provide the reliability necessary to find a conviction of record". (Exhibit 3, District Court Order Regarding Defendant's Motion to Strike Prior Offense). The District Court noted, "the email response from the Spokane County, Washington, did not include the Defendant's name, the charge, the offense for which he was found guilty, the identification of the Court or any other information which this Court can find a 'reliable conviction'." *Id.* The District Court, noted, "as a result, the State failed to meet its burden to utilize Defendant's 2009, conviction for enhancement purposes". *Id.*

However, the District Court improperly agreed with the State that Mr. Holder had a valid DWI conviction on or about January 6, 1990, in Deaf Smith County, Texas, based on an essentially silent record to disposition or judgement, and only stated the word "convicted" on a NCIC. *Id.* Because the NCIC did not show a disposition, sentence, or judgment as required by Montana law, it could not

be used as a qualifying conviction. (Exhibit 2, State's Response to Defendant's Motion to Strike Priors). The District Court noted that Mr. Holder cited Mont. Code Ann. Section 45-2-101(16), which states:

“Conviction” means a judgment of conviction and sentence entered upon a plea of guilty or nolo contendere, or upon a verdict or finding of guilty of an offense rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

The District Court disagreed with Mr. Holder's contentions that the record on the NCIC silent to any “sentence” or “judgment” failed to meet the required definition of conviction under Montana Law. *Id.* Yet, the District Court acknowledged the 1990, DWI record did not identify a sentence or judgment. *Id.* It is Mr. Holder's contention that the failure to show a sentence or judgment prohibits the State from using the unknown status, and lack of conviction requirements under Montana Law for purposes of enhancing the current offense to a felony. *Id.*

The District Court also improperly analyzed *State v. Krebs*, 2016 MT 288, 385 Mont. 328, 384 P3d. 98, where the Montana Supreme Court held it is the State's initial burden to prove the fact of a prior qualifying conviction. *Id.* (Exhibit 1, Motion to Strike Priors).

STANDARD OF REVIEW

Whether a prior conviction may be used for sentence enhancement is generally a question of law, for which the Montana Supreme Court review is de novo. *State v. Maine*, 2011 MT 90, 360 Mont. 182, 255 P.3d 64. However, in determining whether a prior conviction is invalid, the 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. *Id.* The Montana Supreme Court will not disturb such findings unless they are clearly erroneous. *Id.* Yet, another standard has been used on whether a prior conviction may be used to enhance a criminal sentence is a question of law that the Montana Supreme Court reviews for correctness. *State v. Krebs*, 2016 MT 288, ¶ 7, 385 Mont. 328, 384 P.3d 98.

SUMMARY OF ARGUMENT

In this case, the District Court should not have used the State's offered 1990, DWI from Texas, as no qualified "conviction" existed to challenge constitutionally, resulting in the State's failure to meet its burden to prove the existence of a qualifying "conviction" as required by Montana law. It is the State's burden to "prove the fact of a prior conviction." *State v. Krebs*, 2016 MT 288, ¶ 7, 385 Mont. 328, 384 P.3d 98. The State must present "*competent proof* that the defendant, in fact, suffered the prior conviction." *Id.* In this case the State failed its burden, and the District Court's Order must be reversed.

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT DENIED DEFENDANT’S MOTION TO STRIKE PRIOR DUI OFFENSE WHEN THE STATE FAILED TO FIRST SHOW PROOF OF THE EXISTENCE OF A QUALIFYING CONVICTION FOR A 1990 OFFENSE FROM THE STATE OF TEXAS THAT WAS SILENT AS TO ANY SENTENCE OR JUDGMENT.

In this case, the District Court should not have used the State’s offered 1990, DWI from Texas, as the Defendant argued no “conviction” existed, and the State failed to prove a “conviction” had in fact occurred. The facts of this case and issue are similar to the issue and arguments in *Krebs*. *State v. Krebs*, 2016 MT 288, 385 Mont. 328, 384 P.3d 98.

In *Krebs*, the State believed it met its burden to provide sufficient evidence of Krebs's 1988, DUI conviction by introducing the North Dakota court's register of actions. *Id.* Krebs, as the moving party, only disputed the type of DUI conviction as it would result in a completely different outcome depending on the type of the prior DUI. *Id.* Krebs argued the DUI prior conviction was a BAC or *per se* DUI. *Id.* In response, the State argued the burden of proof clearly remained with Krebs to make that showing the DUI prior was a BAC or *per se* DUI. *Id.*

The issue in *Krebs* was who bears the burden of proving whether a prior conviction qualifies as a “conviction” that may be used to support felony enhancement of DUI. *Id.* Which is also, the issue in Mr. Holder’s case here.

In order to be sentenced for felony DUI, a person must have four or more qualifying convictions. *Id. citing State v. Sidmore*, 286 Mont. at 227, 951 P.2d at 564.

A similar analysis is made regarding the statutes governing persistent felony offenders, which require that an offender have two or more qualifying felony convictions to be designated a persistent felony offender. *State v. Krebs*, 2016 MT 288 385 Mont. 328, 384 P.3d 98. In both enhancement statutes, Mont. Code Ann. Section 61-8-731, for felony DUI, and persistent felony offender states under Mont. Code Ann. Section 46-18-501, MCA, prior convictions are considered at sentencing. *State v. Krebs*, 2016 MT 288 385 Mont. 328, 384 P.3d 98.

Krebs challenged whether a 1988, conviction may be used to enhance his penalty to felony status when the State had not proved he had a prior DUI conviction from 1988 in North Dakota. *Id.* The Montana Supreme Court held it is the State's burden to “prove the fact of a prior conviction.” *Id.* The Montana Supreme Court held the State must do so by presenting “*competent proof* that the defendant in fact suffered the prior conviction.” *Id.* The District Court in *Krebs* acknowledged that “the record is inadequate to provide the Court with sufficient information as to whether Krebs's 1988, conviction was a BAC conviction DUI *per se* or an ‘under the influence’ conviction.” *Id.* The District Court concluded,

however, that the burden was on Krebs to provide the court “with sufficient information supporting any argument that his 1988, DUI conviction was a BAC conviction.” *Id.* In doing so, the District Court relied on the procedural framework the Montana Supreme Court established in *Maine* to evaluate collateral challenges to prior convictions. *Id.* Because Krebs failed to meet the burden imposed by *Maine*, the District Court concluded that the 1988, conviction was valid for enhancing his 2014, charge to felony DUI. *Id.*

The Montana Supreme Court reversed the District Court holding, and held an “inadequate record” cannot be competent proof that Krebs in fact suffered a prior conviction that would qualify to enhance his penalty to a felony. *Id.* The Montana Supreme Court told the State, it bore the burden to prove that the 1988, conviction could be used to support its felony charge against Krebs and it failed to meet this burden. *Id.*

In *Krebs*, the type of DUI conviction was vital as a DUI *per se* would have been expunged, and unable to be used to enhance *Krebs*’ DUI to a felony offense, as a prior BAC/DUI *per se* conviction would be “expunged from the defendant’s record” if he/she did not receive another BAC/DUI *per se* conviction within five years, and *Krebs* met that criteria. *Id.* Thus, a BAC or DUI *per se* conviction that was not followed by another BAC or DUI *per se* conviction within that five-year period could not “be counted to support [a] charge of felony DUI.” *Id.*

The State in *Krebs* could not prove the DUI conviction was a qualifying conviction, just as in this case. Here the State failed to prove the existence of a qualified conviction from 1990, in Texas, through a copy of a NCIC without a sentence or judgment. Such evidence was not sufficient proof to establish a conviction for enhancement purposes.

As stated previously, Mont. Code Ann. Section 45-2-101(16), states:

“Conviction” means a judgment of conviction and sentence entered upon a plea of guilty or nolo contendere or upon a verdict or finding of guilty of an offense rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

In this case, the State did not provide the existence of a qualified conviction to enhance the current DUI to a felony offence. The State failed to provide a sentence, or a judgment. The State offered only an unclear and silent NCIC.

CONCLUSION

The State failed to provide proof of the existence of a qualified conviction for a possible DWI in Texas in 1990. The failure to provide a qualifying conviction, means the possible DWI from Texas could not be used to enhance the current DUI offense to a felony in this case. The District Court acknowledged the record was silent as to the sentence and judgment for this possible 1990, Texas DWI, yet refused to strike it from the record for enhancement purposes. Montana Law is clear the State must first provide proof of a qualifying conviction before it

can be used for enhancement purposes. Consequently, the District Court's ruling must be reversed.

DATED this 16th day of January, 2019.

By 
JAMI REBSOM

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify this Response Brief is written with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is 2,442 excluding the Certificate of Compliance and Certificate of Service.

DATED this 16th day of January, 2019.

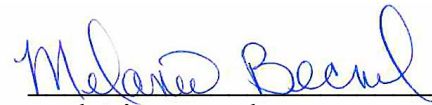
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I hereby certify that I served a full, true and accurate copy of the foregoing document on the 16th day of January, 2019 to the following named person(s):

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I, Jami L. Rebsom, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-16-2019:

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