
STATE OF MONTANA,

Plaintiff and Appellee,

v.

STACY SCHMIDT,

Defendant and Appellant.

ANDERS BRIEF OF APPELLANT

On Appeal from the Montana Eighteenth Judicial District Court,
Gallatin County, the Honorable John C. Brown, Presiding

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SUMMARY OF PROCEDURAL HISTORY

On March 23, 2016, the State filed an Information charging Stacy Schmidt with the offense of Driving Under the Influence of Alcohol, (fourth or subsequent offense), in violation of Mont. Code Ann. § 61-8-401. On April 26, 2016, Ms. Schmidt appeared at her initial appearance, was read the charge, her rights, and the maximum possible penalties and plead not guilty. (D.C. Doc. 11.) Ms. Schmidt was released on \$30,000 bond. (D.C. Doc. 12.)

On May 25, 2016, the district court granted Ms. Schmidt's request for a continuance of the omnibus hearing. (D.C. Doc. 13.)

On June 15, 2016, the State filed a petition to revoke Ms. Schmidt's release alleging that she had violated the terms of her release by failing to report to Pretrial Services for random intoxicant testing. (D.C. Doc. 14.) The district court issued an arrest warrant for Ms. Schmidt. (D.C. Doc. 16.) On June 28, 2016, Ms. Schmidt appeared on the warrant, and the district court found that she had violated the terms of her release but continued the terms of her release unchanged. (D.C. Doc. 18.)

On August 26, 2016, the district court granted Ms. Schmidt's request for a continuance of the omnibus hearing. (D.C. Doc. 20.)

On September 22, 2016, the State filed a petition to revoke Ms. Schmidt's release alleging that she had violated the terms of her release by failing to report to Pretrial Services for random intoxicant testing and failed to provide a urine sample. (D.C. Doc. 21.) The district court issued an arrest warrant for Ms. Schmidt. (D.C. Doc. 22.)

On September 28, 2016, the district court granted Ms. Schmidt's request for a continuance of the omnibus hearing. (D.C. Doc. 24.)

On October 5, 2016, Ms. Schmidt appeared on the warrant and the district court found that she had violated the terms of her release but continued the terms of her release unchanged. (D.C. Doc. 26.)

On October 26, 2016, the district court granted Ms. Schmidt's request for a continuance of the omnibus hearing. (D.C. Doc. 29.)

On November 16, 2016, the State filed a petition to revoke Ms. Schmidt's release alleging that she had violated the terms of her release by failing to report to Pretrial Services for random intoxicant testing and consuming alcohol. (D.C. Doc. 30.) The district court issued an arrest warrant for Ms. Schmidt. (D.C. Doc. 31.)

On November 21, 2016, the district court granted Ms. Schmidt's request for a continuance of the omnibus hearing. (D.C. Doc. 32.)

On November 30, 2016, Ms. Schmidt appeared on the warrant and the district court found that she had violated the terms of her release and continued the terms of her release unchanged but for an additional requirement that she be subject to 24-hour SCRAM ankle monitoring for alcohol. (D.C. Docs. 34, 35.)

On December 21, 2016, the district court granted Ms. Schmidt's request for a continuance of the omnibus hearing. (D.C. Doc. 38.)

On January 25, 2017, the district court granted Ms. Schmidt's request for a continuance of the omnibus hearing. (D.C. Doc. 39.)

On February 10, 2017, defense counsel filed a notice of substitution of counsel, indicating that Chad Glenn would take the place of Valerie Cairns as her attorney. (D.C. Doc. 40.)

On February 22, 2017, the district court granted Ms. Schmidt's request for a continuance of the omnibus hearing. (D.C. Doc. 41.)

On March 28, 2017, defense counsel filed a notice of substitution of counsel, indicating that Alex Jacobi would take the place of Chad Glenn as her attorney. (D.C. Doc. 42.)

On March 29, 2017, the district court granted Ms. Schmidt's request for a continuance of the omnibus hearing. (D.C. Doc. 44.)

On April 26, 2017, the district court modified the conditions of Ms. Schmidt's release upon her motion to remove the SCRAM ankle monitor requirement. (D.C. Doc. 48, 49.)

On April 26, 2017, the district court granted Ms. Schmidt's request for a continuance of the omnibus hearing. (D.C. Doc. 50.)

On June 21, 2017, the State filed a petition to revoke Ms. Schmidt's release alleging that she had violated the terms of her release by failing to report to Pretrial Services for random intoxicant testing. (D.C. Doc. 51.) The district court issued an arrest warrant for Ms. Schmidt. (D.C. Doc. 52.)

On June 28, 2017, the district court quashed the warrant and set a future hearing on the petition to revoke release. (D.C. Doc. 55.) The district court also set pre-trial and trial dates. (D.C. Doc. 55.)

On July 5, 2017, the district court continued the revocation of release hearing upon notice that additional allegations of violation had been filed. (D.C. Doc. 57.) On July 11, 2017, the State filed another petition to revoke alleging that Ms. Schmidt had failed to report to

Pretrial Services and had consumed alcohol. (D.C. Doc. 59.) The district court issued an arrest warrant for Ms. Schmidt. (D.C. Doc. 60.)

On July 19, 2017, the district court quashed the warrant and continued the revocation hearing at Ms. Schmidt's counsel's request (Ms. Schmidt was not present). (D.C. Doc. 61.)

On July 26, 2017, the district court found that Ms. Schmidt had violated the terms of her release and continued bail as previously set and required that Ms. Schmidt participate in random drug and alcohol testing as a condition of her release. (D.C. Docs. 66, 67.)

On August 4, 2017, Ms. Schmidt filed a motion to dismiss the DUI and brief in support. (D.C. Doc. 69.) The basis for the motion was that the predicate DUIs from Nevada that formed the basis for the felony DUI charge did not qualify as convictions because the Nevada statute under which Ms. Schmidt had been convicted was not substantially similar to Montana's DUI statutes. (D.C. Doc. 69.)

On August 10, 2017, the district court amended the conditions of release to remove random drug testing at Ms. Schmidt's request. (D.C. Doc. 71.) On August 15, 2017, the State responded to Ms. Schmidt's motion to dismiss, arguing that the Nevada statute under

which she was convicted was sufficiently similar to Montana's to qualify as a predicate offense. (D.C. Doc. 73.) The motion was not addressed by the district court until after trial.

On August 30, 2017, the State filed another petition to revoke alleging that Ms. Schmidt had consumed alcohol. (D.C. Doc. 75.) The district court issued an arrest warrant for Ms. Schmidt. (D.C. Doc. 77.)

On September 8, 2017, the district court held a hearing on the motion to dismiss combined with a final pretrial conference. (D.C. Doc. 79.) Ms. Schmidt was not present. (D.C. Doc. 79.) The Court vacated the final pretrial conference and reset the case for an omnibus hearing and a hearing to address the latest petition to revoke release. (D.C. Doc. 79.) The previously issued warrant was continued and the motion to dismiss was not addressed.

On September 13, 2017, the parties appeared, and the district court quashed the warrant and set a hearing on the latest petition to revoke. (D.C. Doc. 83.)

On September 15, 2017, Ms. Schmidt filed a waiver of speedy trial. (D.C. Doc. 86.)

On September 29, 2017, counsel for Ms. Schmidt appeared without her present and the district court granted her request for a continuance of the hearing on the petition to revoke release. (D.C. Doc. 90.)

On October 4, 2017, the parties appeared and a contested release revocation hearing was held and the district court declined to revoke the existing order setting conditions of release and bail. (D.C. Doc. 92.)

On December 15, 2017, the State filed another petition to revoke release alleging that Ms. Schmidt had failed to report to Pretrial Services for random alcohol testing. (D.C. Doc. 96.) The district court issued an arrest warrant for Ms. Schmidt. (D.C. Doc. 97.)

On January 19, 2018, the district court modified the conditions of release upon motion of Ms. Schmidt to require 24-hour alcohol monitoring via the SCRAM ankle bracelet. (D.C. Doc. 106.)

On January 31, 2018, the parties were present for a contested release revocation hearing in which the district court found that Ms. Schmidt had violated the terms of her release. The district court nonetheless continued all release conditions as currently set. (D.C. Doc. 108; 1/31/18 Tr. at 42.)

On March 30, 2018, Ms. Schmidt filed motions in limine. (D.C. Doc. 118.) The district court granted them in full upon no objection from the State. (D.C. Doc. 124.)

The two-day jury trial began on April 11, 2018. (D.C. Doc. 125; 4/9/18 Tr.) During the settling of jury instructions, Ms. Schmidt objected to the State's proposed jury instruction number ten instructing the jury on admissions or confessions by the defendant. (4/10/18 Tr. at 306.) The district court overruled the objection and gave the proposed instruction. (4/10/18 Tr. at 390 (Attached as App. A.); D.C. Doc. 130, Instruction 12 (Attached as App. B).)

During the direct examination of the forensic toxicologist from the State Crime Lab, counsel for Ms. Schmidt objected to expert testimony regarding the correlation between the numerical value of the blood alcohol content and the subject's ability to perform the standardized field sobriety tests. (4/10/18 Tr. at 370.) The basis of the objection was that the testimony was beyond the scope of the expert's expertise and Mont. R. Evid. 403. (4/10/18 Tr. at 368, 370.) The district court overruled the objection. (4/10/18 Tr. at 370 (Attached as App. C).) Defense counsel renewed the objection, and it was again overruled.

(4/10/18 Tr. at 374 (Attached as App. D).) Defense counsel then objected to testimony of the forensic toxicologist regarding the effects of alcohol on the brain. (4/10/18 Tr. at 376.) That objection was sustained. (4/10/18 Tr. at 376.)

The district court gave the State's proposed jury instruction regarding inferences that can be drawn from the blood alcohol content of the defendant over objection of defense counsel. (4/10/18 Tr. at 395 (Attached as App. E); D.C. Doc. 130, Instruction 7 (Attached as App. F).) The basis for that ruling was that, "I looked at that and at the end of the day I felt I was obligated to give 4-B instead of 4 because that is the current version, the language in the statute." (4/10/18 Tr. at 395.) The district court gave the instruction because it was the current statutory language. The statute referred to by the district court was Mont. Code Ann. § 61-8-401(4).

Ms. Schmidt was found guilty. (D.C. Doc. 132.)

On June 8, 2018, defense counsel filed a reply to the August 15, 2017 response to the motion to dismiss for lack of sufficient predicate DUIs. (D.C. Doc. 138.) The district court, on August 13, 2018, denied the motion to dismiss that was originally filed on August 4, 2017. (D.C.

Doc. 153 (Attached as App. G.) The basis for the denial was twofold: (1) that Ms. Schmidt was convicted under the Nevada DUI statute subsection that is substantially similar to Montana's DUI statute and (2) that Ms. Schmidt also had been convicted of three prior DUIs, each of which qualified as a predicate offense, in Montana. (D.C. Doc. 153.) At the first sentencing hearing, defense counsel acknowledged the existence of three qualifying predicate DUIs. (6/14/18 Sent. Tr. at 8.)

Ms. Schmidt was sentenced to the Department of Corrections for 13 months for placement in the appropriate correctional facility or program, followed by a consecutive suspended 4-year commitment to the Department of Corrections. (9/12/18 Sent. Tr. at 19; D.C. Doc. 157 (Attached as App. F).)

DISCUSSION OF APPELLANT'S CLAIMS THAT MIGHT ARGUABLY SUPPORT AN APPEAL

Pursuant to Mont. Code Ann. § 46-8-103(2) and *Anders v. California*, 386 U.S. 738, 744 (1967), undersigned counsel informs the Court that the record might arguably support the following claims on appeal.

- I. The district court erred when it instructed the jury on admissions and confessions of the defendant.**

Pertinent Facts

During the settling of jury instructions, Ms. Schmidt objected to the State's proposed jury instruction number ten instructing the jury on admissions or confessions by the defendant. (4/10/18 Tr. at 306.) The district court overruled the objection and gave the proposed instruction. (4/10/18 Tr. at 390; D.C. Doc. 130, Instruction 12.) The State elicited on direct exam of the arresting officer and emphasized in closing argument that in State's Exhibit 1, the video recording of the stop, Ms. Schmidt said, "I'm so fucked." (State's Exhibit 1 at 19:14; 4/9/18 Tr. at 163; 4/10/18 Tr. at 416.) Whether or not this statement was made voluntarily was not addressed by the district court.

Pertinent Law

How a district court instructs a jury is reviewed for an abuse of discretion. *State v. Christiansen*, 2010 MT 197, ¶ 7, 357 Mont. 379, 239 P.3d 949. Jury instruction must fully and fairly instruct the jury regarding the applicable law. *Christiansen*, ¶ 7. To constitute reversible error, faulty jury instructions must prejudicially affect the defendant's substantial rights. *Christiansen*, ¶ 7. District courts must

instruct the jury on each theory which is supported by the record. *State v. Archambault*, 2007 MT 26, ¶ 25, 336 Mont. 6, 152 P.3d 698.

“If [a] confession or admission is determined to be admissible, the circumstances surrounding the making of the confession or admission may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession or admission.” Mont. Code Ann. § 46-13-301(3). Before a confession may be admitted into evidence, the State must demonstrate that it was made voluntarily. *State v. White*, 146 Mont. 226, 236-237, 405 P.2d 761, 767 (1965) (abrogated on other grounds).

II. The district court erred when it overruled an objection regarding the forensic toxicologist’s testimony correlating blood alcohol level and field sobriety test results.

Pertinent Facts

During the direct examination of the forensic toxicologist from the state crime lab, counsel for Ms. Schmidt objected to expert testimony regarding the correlation between the numerical value of the blood alcohol content and the subject’s ability to perform the standardized field sobriety tests. (4/10/18 Tr. at 370.) The basis of the objection was that the testimony was beyond the scope of the expert’s expertise and

Mont. R. Evid. 403. (4/10/18 Tr. at 368, 370.) The district court overruled the objection. (4/10/18 Tr. at 370.) Defense counsel renewed the objection, and it was again overruled. (4/10/18 Tr. at 374.) The district court then sustained a defense objection to testimony of the forensic toxicologist regarding the effects of alcohol on the brain. (4/10/18 Tr. at 376.)

Pertinent Law

This Court reviews a district court's ruling on the admissibility of expert testimony for an abuse of discretion. *State v. Crawford*, 2003 MT 118, ¶ 8, 315 Mont. 480, 68 P.3d 848. "A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial." Mont. Code Ann. § 46-20-701.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education by testify thereto in the form of an opinion or otherwise." Mont. R. Evid. 702. Expert testimony is only admissible where the subject matter of the testimony is one that requires expert

testimony, i.e., when the matter is sufficiently beyond common experience that the opinion of the expert will assist the trier of fact to understand the evidence or determine a fact at issue. *State v. Southern*, 1999 MT 94, ¶ 49, 294 Mont. 225, 980 P.2d 3. Once it is established that the subject matter requires expert testimony, the district court must then decide whether the particular witness is qualified as an expert to give an opinion in the particular area on which they propose to testify. *Southern*, ¶ 48. The State must provide an adequate foundation showing that the proposed expert has “special training or education and adequate knowledge on which to base an opinion.” *Southern*, ¶ 48.

III. The district court erred when it instructed the jury using the State’s proposed jury instruction about inferences allowed based upon blood alcohol concentration.

Pertinent Facts

The district court gave the State’s proposed jury instruction regarding inferences that can be drawn from the blood alcohol content of the defendant over objection of defense counsel. (4/10/18 Tr. at 395; D.C. Doc. 130, Instruction 7.) The basis for that ruling was that the State’s proposed jury instruction was identical to the governing statute.

(4/10/18 Tr. at 395.) The statute referred to by the district court was Mont. Code Ann. § 61-8-401(4).

Pertinent Law

How a district court instructs a jury is reviewed for an abuse of discretion. *Christiansen*, ¶ 7. Jury instruction must fully and fairly instruct the jury regarding the applicable law. *Christiansen*, ¶ 7. To constitute reversible error, faulty jury instructions must prejudicially affect the defendant's substantial rights. *Christiansen*, ¶ 7.

Montana Code Annotated § 61-8-401(4) provides:

Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person at the time of a test, as shown by analysis of a sample of the person's blood or breath drawn or taken within a reasonable time after the alleged act, gives rise to the following inferences:

(a) If there was at that time an alcohol concentration of 0.04 or less, it may be inferred that the person was not under the influence of alcohol.

(b) If there was at that time an alcohol concentration in excess of 0.04 but less than 0.08, that fact may not give rise to any inference that the person was or was not under the influence of alcohol, but the fact may be considered with other competent evidence in determining the guilt or innocence of the person.

(c) If there was at that time an alcohol concentration of 0.08 or more, it may be inferred that the person was under the influence of alcohol. The inference is rebuttable.

IV. The district court erred when it denied Ms. Schmidt's motion to dismiss.

Pertinent Facts

Ms. Schmidt filed a motion to dismiss the felony DUI on the basis that the predicate Nevada DUIs that formed the basis for the felony DUI charge did not qualify as convictions because the Nevada statute under which she was convicted was not substantially similar to Montana's DUI statutes. (D.C. Doc. 69.)

The district court denied the motion on the bases: (1) that Ms. Schmidt was convicted under the Nevada DUI statute subsection NRS 484.379(1)(a) that is substantially similar to Montana's DUI statute and (2) that Ms. Schmidt had been convicted of three prior DUIs in Montana. (D.C. Doc. 153.) Defense counsel acknowledged the existence of the three qualifying Montana predicates. (6/14/18 Tr. at 8.)

Pertinent Law

"Whether a prior conviction may be used for sentence enhancement is generally a question of law." *State v. Calvert*, 2013 MT 374, ¶ 6, 373 Mont. 152, 316 P.3d 173. Conclusions of law in the application of statutes are reviewed for correctness. *Calvert*, ¶ 6.

A fourth or subsequent conviction for DUI in Montana is a felony offense. Mont. Code Ann. § 61-8-731. Predicate convictions from other states must be under a “similar statute or regulation.” Mont. Code Ann. § 61-8-734(1)(a). If another state allows a defendant to be convicted using a lesser standard than would be required in Montana for conviction, the statutes are not “similar.” *Calvert*, ¶ 8.

Nevada’s DUI statute NRS 484.379(1)(a) is “similar” to Mont. Code Ann. § 46-8-401. *Calvert*, ¶ 13.

V. Counsel was ineffective for failing to argue that DUI convictions for driving while under the influence of drugs do not count as predicate offenses for a fourth or subsequent charge alleging intoxication by alcohol.

Pertinent Facts

Ms. Schmidt wrote a letter to the court indicating that prior DUI convictions for driving while under the influence of drugs do not count as predicate offenses for a fourth or subsequent charge alleging intoxication by alcohol. (D.C. Doc. 154.) Defense counsel did not make this argument.

Pertinent Law

The Sixth Amendment of the United States Constitution and Article II, Section 24, of the Montana Constitution guarantee the right

to effective assistance of counsel. *Whitlow v. State*, 2008 MT 140, ¶ 10, 343 Mont. 90, 183 P.3d 861. To prove ineffective assistance of counsel a defendant must show (1) that counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defense.

Whitlow, ¶ 10.

Ineffective assistance of counsel claims fall into two categories: record-based and non-record based. *State v. Novak*, 2005 MT 294, ¶ 18, 329 Mont. 309, 124 P.3d 182. This Court hears only record-based ineffective assistance claims on direct appeal. *Novak*, ¶ 18. This Court determines whether the record discloses why counsel took, or failed to take, the action in controversy when determining whether an ineffective assistance of counsel claim is appropriate for direct, record-based review. *Novak*, ¶ 18. A claim of ineffective assistance of counsel must be raised in a petition for post-conviction relief if the allegation cannot be documented from the record. *Novak*, ¶ 18.

Montana's DUI statute prohibits driving under the influence of alcohol and/or drugs:

It is unlawful and punishable, as provided in 61-8-442, 61-8-714, and 61-8-731 through 61-8-734, for a person who is under the influence of:

- (a) alcohol to drive or be in actual physical control of a vehicle upon the ways of this state open to the public;
- (b) a dangerous drug to drive or be in actual physical control of a vehicle within this state;
- (c) any other drug to drive or be in actual physical control of a vehicle within this state; or
- (d) alcohol and any dangerous or other drug to drive or be in actual physical control of a vehicle within this state.

Mont. Code Ann. § 61-8-401.

If a person is convicted of DUI and has any combination of three or more prior convictions of DUI, the person is guilty of a felony. Mont. Code Ann. § 61-8-731.

CONCLUSION

Undersigned counsel has not identified any non-frivolous issues to raise in this appeal, and, therefore, requests this Court allow counsel to withdraw from this representation.

Respectfully submitted this 7th day of February, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *Anders* brief is printed with a proportionately spaced Century Schoolbook 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 3731, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Gregory Hood
GREGORY HOOD

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CERTIFICATE OF SERVICE

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