

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 20-0022

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ERIC VALLEJO,

Petitioner and Appellant,

v.

STATE OF MONTANA,  
MONTANA DEPARTMENT OF JUSTICE,  
MOTOR VEHICLE DIVISION,

Respondent and Appellee.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana Fourth Judicial District Court,  
Missoula County, The Honorable Robert L. Deschamps III, Presiding

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### **ISSUES PRESENTED**

1. Did the officer have probable cause to arrest Vallejo for driving under the influence of alcohol?
2. Did Vallejo waive his claim that the State did not prove he was under arrest when he refused to take the breath test?
3. Does the minor discrepancy of an incorrect date on the citation impact the suspension of Vallejo's driver's license?
4. Did the district court erroneously rely on hearsay evidence to support the revocation of Vallejo's driver's license?
5. Did Vallejo waive his claim that there is no evidence the implied consent advisory was read?

### **STATEMENT OF THE CASE**

Appellant Eric Vallejo filed a petition challenging his driver's license suspension under Mont. Code Ann. § 61-8-402, and requested the court order a stay of the suspension pending hearing of the case under Mont. Code Ann. § 61-8-403(3), in Montana Fourth Judicial District Court, Missoula County. (Doc. 1.) Vallejo alleged he "lawfully refused to provide a breath sample that law enforcement maintains gave the government the right to automatically suspend [his] license for the period of six months under Mont. Code Ann. § 61-8-402" because the evidence failed to establish that there was particularized

suspicion to authorize his stop or probable cause to support his warrantless arrest.  
(Doc. 1 at 2-3.)

The district court held a hearing on January 6, 2020. At the hearing, Vallejo attempted to establish there were no facts which would indicate he was driving while impaired. (Tr. at 29-40.) The district court did not issue a written order but upheld the driver's license suspension. (Tr. at 71.) Vallejo timely appealed.

### **STATEMENT OF FACTS**

At about 9:05 p.m. on February 26, 2019, City of Missoula Police Sergeant Matt Kazinsky stopped Vallejo because his vehicle lacked operating rear brake lights. (Tr. at 11-12.) At initial contact, Sgt. Kazinsky followed routine procedure, describing the reason for the stop and asking for Vallejo's license, registration, and insurance. (Tr. at 13.) Vallejo provided only the license, and Sgt. Kazinsky noticed that he had issues with divided attention because he "stared off" rather than looking for the other two documents, necessitating repetition of Sgt. Kazinsky's request. (Tr. at 13-14.) Sgt. Kazinsky detected the odor of alcohol coming off Vallejo's breath and body, as well as a "glassed-over" look in his eyes and slurring in his speech. (Tr. at 14-15.) Further, it appeared that at times Vallejo was not comprehending what Sgt. Kazinsky was saying. (Tr. at 37.) Vallejo stated he came from the Desperado bar where he had two twelve-ounce beers. (Tr. at 14.)

Based on his observations, Sgt. Kazinsky called for another unit to conduct a DUI investigation. (Tr. at 15.) Officer McLean responded, and Vallejo's previously cooperative behavior became less so when he exited his vehicle without being asked and after Sgt. Kazinsky told him to remain inside. (Tr. at 15-16.) Sgt. Kazinsky noted that after Vallejo exited his vehicle, he became belligerent. (Tr. at 46.) Sgt. Kazinsky heard Officer McLean request Vallejo perform standard field sobriety tests (SFSTs), which Vallejo refused. (Tr. at 18.) Officer McLean issued Vallejo a citation for DUI, Mont. Code Ann. § 61-8-401, and obstruction of justice, Mont. Code Ann. § 45-7-303. (Pet'r's Ex. A, admitted at Tr. at 44.) Vallejo was taken to jail, where his refusal to perform any testing continued. (Tr. at 25.)

At the January 6, 2020 hearing, Officer McLean was not present. Sgt. Kazinsky described the preliminary alcohol screening test advisory read to DUI suspects before a preliminary breath test but was not allowed to testify whether Vallejo refused the test because he did not have personal knowledge of that fact. (Tr. at 19-20.) Sgt. Kazinsky testified that a search warrant was obtained to get a blood sample from Vallejo, and that the issuance of a warrant means that Vallejo refused to take a breath test at the jail. (Tr. at 21-25.) Vallejo testified that he received the citation on February 26, 2019 and appeared in the municipal court on February 27 after posting bail. (Tr. at 52-53, 55-56.)

The district court took judicial notice of Judge Jenks' order in the criminal case in which Vallejo argued against the sufficiency of the warrant because Officer McLean mistakenly noted that Vallejo's 2016 implied consent refusal happened in Illinois rather than Montana. (Tr. at 25-26; Order of the Court at 1-2, admitted through judicial notice at Tr. at 26.) The municipal court found Officer McLean made the following observations: there was a strong odor of alcohol coming from Vallejo; Vallejo's eyes were bloodshot and "glossy"; Vallejo swayed while standing and speaking to Officer McLean; Vallejo became more belligerent as the stop continued; Vallejo stated he came from the Desperado bar where he had two twelve-ounce beers; and Vallejo had an implied consent refusal in 2016. (Order of the Court at 2.) The municipal court further found the warrant was granted based on these observations. (Order of the Court at 2.) While the municipal court acknowledged there was an error in the warrant affidavit, it found that once the portion indicating the implied consent refusal occurred in Illinois was stricken, the affidavit would meet the requirements of Mont. Code Ann. § 61-8-402(4) and (5). (Order of the Court at 3-4.)

Vallejo presented evidence that the date on the citation reads February 23, 2019, even though the stop occurred on February 26, 2019. (Tr. at 52). Sgt. Kazinsky testified he stopped Vallejo and initiated the investigation on February 26, 2019. (Tr. at 45.) Further, February 26, 2019 was a Tuesday and



Vallejo testified the events in question occurred on Tuesday, February 26, 2019. (Tr. at 52, 54.) The district court attributed the incorrect date on the citation to a clerical mistake and noted it had no material significance to the proceedings. (Pet'r's. Ex. A; Tr. at 57.) Vallejo did not argue or present any evidence he was not actually stopped, investigated, and charged on February 26, 2020.

At the conclusion of the evidence, the State argued that Vallejo was legally stopped for an equipment violation, and then officers observed sufficient evidence to have probable cause to arrest Vallejo. (Tr. at 58-63.) In Vallejo's closing argument, his counsel argued for the first time that there was a question of whether he was ever arrested, and there was no evidence that he was under arrest when he refused to provide a breath sample. (Tr. at 63-66.) He also argued that there was a lack of evidence that Vallejo was intoxicated. (Tr. at 66-67.) In response, the State pointed out that Vallejo testified that he went to jail and posted bail the next day. (Tr. at 68.)

The district court found that there was "reasonable cause" to believe that Mr. Vallejo was under the influence of alcohol; that he was sufficiently restrained of his freedom to leave, meeting the criteria for arrest under Mont. Code Ann. § 46-6-104; and that he refused to participate in testing, necessitating issuance of a search warrant. (Tr. at 70.) The district court considered these factors sufficient to uphold the driver's license suspension. (*Id.*)

## **SUMMARY OF ARGUMENT**

Ample probable cause existed to arrest Vallejo for driving under the influence of alcohol based on multiple factors Sgt. Kazinsky observed after the initial stop, including that Vallejo smelled of alcohol; that his eyes were glassy; that his speech was slurred; that he appeared to have trouble understanding what was said; that a request for documentation needed to be repeated; that he became belligerent; and that he admitted he had two twelve-ounce beers.

Vallejo cannot challenge the timing of the arrest because he waived this claim by failing to raise it in his petition to the district court. Vallejo also waived his claim that he was not read the implied consent advisory because he similarly did not raise this claim in his petition. The minor and immaterial discrepancy of the dates on the citation and in testimony does not have any impact on the license suspension because this is not an issue a court may consider when reviewing the legality of a driver's license suspension. Even if this Court could review this issue, the error in the date would be harmless because it does not affect Vallejo's understanding of the charges.

Finally, Sgt. Kazinsky's testimony about Vallejo's refusal to take sobriety tests is not hearsay because Sgt. Kazinsky testified about his observation, rather than an out-of-court statement. Even if his testimony that Vallejo declined the tests recounts Vallejo's statement, the statement would not be hearsay because it is a

statement by a party opponent. This Court should affirm the suspension of Vallejo's license.

### **STANDARD OF REVIEW**

When reviewing a petition to reinstate a driver's license, this Court determines whether the district court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *Brown v. State*, 2009 MT 64, ¶ 8, 349 Mont. 408, 203 P.3d 842. The suspension of a driver's license is presumed to be correct, so the petitioner bears the burden of proving the State's action was improper. *Id.*

### **ARGUMENT**

#### **I. Law applicable to driver's license suspensions**

Under Montana's implied consent law, "[a] person who operates or is in actual physical control of a vehicle upon ways of this state open to the public is considered to have given consent to a test or tests of the person's blood or breath for the purpose of determining any measured amount or detected presence of alcohol or drugs in the person's body." Mont. Code Ann. § 61-8-402(1). A blood or breath test "must be administered at the direction of a peace officer when: (i) the officer has reasonable grounds to believe that the person" has committed driving under the influence (DUI) or aggravated DUI and the person has been arrested for

either of those offenses. Mont. Code Ann. § 61-8-402(2)(a)(i). A person who refuses to take the test designated by the arresting officer has their driver's license suspended for a minimum of six months. Mont. Code Ann. § 61-8-402(4), (8).

A person whose license is suspended may challenge the suspension of their license under Mont. Code Ann. § 61-8-403. When the court is reviewing a driver's license suspension for refusal to take a test under Mont. Code Ann.

§ 61-8-402(2)(a)(i), the court's review is limited to: (1) whether an officer had reasonable grounds to believe the person had been driving or in actual physical control of a vehicle on public roadways while under the influence of alcohol, drugs, or both; (2) whether the person was placed under arrest for driving under the influence or aggravated driving under the influence; and (3) whether the person refused to submit to one or more required tests. *Indreland v. State*, 2019 MT 141, ¶ 18, 396 Mont. 153, 451 P.3d 51 (citing Mont. Code Ann. § 61-8-403(4)(a)(i), (iv)).

## **II. The officer had probable cause to arrest Vallejo for driving under the influence of alcohol.**

In this case, the legality of Vallejo's initial stop is not challenged. (Appellant's Opening Br. at 5). Rather, Vallejo challenges the existence of reasonable grounds to arrest him and require he submit to a breath test. (*Id.* at 6).

An officer may arrest a person without a warrant if there is probable cause to believe that person is committing or has committed an offense. Mont. Code Ann. § 46-6-311; *see also Indreland*, ¶ 18 (noting that an arrest is lawful if it is supported by probable cause). Probable cause exists when the facts and circumstances within the arresting officer's personal knowledge are sufficient for a reasonable person to believe the suspect has committed an offense. *Hulse v. DOJ, Motor Vehicle Div.*, 1998 MT 108, ¶ 13, 289 Mont. 1, 961 P.2d 75. It is unlawful for a person who is under the influence of alcohol to drive or be in actual physical control of a vehicle upon ways of this state open to the public. Mont. Code Ann. § 61-8-401(1)(a). Probable cause to arrest for DUI requires more indicia of intoxication than just the suspect smelling of alcohol. *Bush v. Montana DOJ, Motor Vehicle Div.*, 1998 MT 270, ¶¶ 16-19, 291 Mont. 359, 968 P.2d 716. Other such indicia can include: (1) glassy or bloodshot eyes; (2) slurred speech; (3) trouble understanding and responding to simple instructions; (4) problems balancing; (5) a flushed face; (6) argumentative behavior; and (7) field sobriety test results. *State v. Hafner*, 2010 MT 233, ¶¶ 18-19, 358 Mont. 137, 243 P.3d 435; *Missoula v. Forest*, 236 Mont. 129, 132-33, 769 P.2d 699, 701 (1989). Notably, the absence of field sobriety test results does not fatally flaw a probable cause determination. *Forest*, 236 Mont. at 133, 769 P.2d at 701.

Here, there were more than sufficient facts and circumstances to support a probable cause determination. Sgt. Kazinsky testified that Vallejo smelled of alcohol; that his eyes were glassy; that his speech was slurred; that he appeared to have trouble understanding what was said; that a request for documentation needed to be repeated; and that he became belligerent. (Tr. at 13-15, 37, 46.) Sgt. Kazinsky's testimony is corroborated by the municipal court's order, wherein the court found that: Vallejo smelled strongly of alcohol; his eyes were bloodshot and "glossy;" he swayed while standing; and he became belligerent. (Order of the Court at 2.) Further, both Sgt. Kazinsky and the municipal court noted that Vallejo stated he drank two twelve-ounce beers at the Desperado bar. (Tr. at 14; Order of the Court at 2.) As demonstrated, Vallejo exhibited nearly every DUI indicium listed in *Bush*, *Haffner*, and *Forest*, coupled with his admission to drinking. The district court correctly found that the evidence presented supported the existence of probable cause to arrest Vallejo. (Tr. at 70.) The fact that Vallejo refused to take the field sobriety tests, meaning there are no field sobriety test results, does not invalidate a finding of probable cause. (Tr. at 18; *Forest*, 236 Mont. at 133, 769 P.2d at 701). Therefore, the facts and circumstances allowed the arresting officer to have a reasonable belief Vallejo committed the offense of DUI outlined in Mont. Code Ann. § 61-8-401(1)(a), under which he could be arrested.

**III. Vallejo waived his claim that the State did not establish he was arrested when he refused to provide a breath test.**

Vallejo argues that the court erred in denying his challenge to his driver's license suspension because the State did not prove he was arrested when he refused to provide a breath test. (Appellant's Opening Br. at 8). Vallejo did not raise the issue of the timing of the arrest in his petition to the district court. (Doc 1.) Vallejo did, however, admit he was arrested, stating that there was a warrantless arrest that took place. (Doc. 1 at 2.) The first mention of the arrest's timing being an issue occurs in Vallejo's closing argument in the district court, after the State presented its evidence. (Tr. at 64.)

Vallejo did not preserve this issue because he did not raise it in his petition, and therefore did not put the State on notice that he was raising this claim. Unlike a criminal trial, where the State has the burden to establish the elements of an offense, "when a driver challenges his license suspension under § 61-8-403, MCA, the driver bears the burden of proving the State's action was improper by a preponderance of the evidence." *Indreland*, ¶ 13. All grounds challenging the driver's license suspension must be raised in the Petition to provide the State with notice and to give the State an adequate opportunity to respond with evidence. *See McJunkin v. Kaufman and Broad Home Sys.*, 229 Mont. 432, 437-38, 748 P.2d 910, 913 (1987) (stating in a civil case that an appellant is limited to the claims raised in his complaint because the other party must be given fair notice of the

claims). By waiting until the submission of evidence was complete to raise this claim, Vallejo waived the claim.

Further, Vallejo's argument fails on the merits because he, rather than the State, bears the burden to prove that the suspension of his license was improper. *Brown*, ¶ 8. The lack of evidence about the timing of his arrest does not, therefore, demonstrate that his driver's license suspension was improper. Instead, he would have to put on evidence demonstrating that he was not under arrest when he refused to take the breath test authorized by Mont. Code Ann. § 61-8-402(2). He has not put on such evidence, and has not specifically alleged that an officer requested that he take the breath test when he was not arrested. His reliance on the State's failure to present evidence is not sufficient to meet his burden to demonstrate that his driver's license suspension was unlawful.

Finally, the State did present evidence that Vallejo was under arrest when he refused to take the breath test. Sgt. Kazinsky testified that the issuance of a search warrant meant that Vallejo refused testing at the jail, indicating a refusal occurred after arrest. (Tr. at 25.) Sgt. Kazinsky's testimony indicates that Vallejo was under arrest when he refused to take the breath test. His claim that there was insufficient evidence is therefore incorrect.



**IV. The incorrect date on the citation does not impact the suspension of Vallejo's driver's license.**

When the court is reviewing a driver's license suspension for refusal to submit to a test under Mont. Code Ann. § 61-8-402(2)(a)(i), the court's review is limited to the following: (1) whether an officer had reasonable grounds to believe the person had been driving or in actual physical control of a vehicle on public roadways while under the influence of alcohol, drugs, or both; (2) whether the person was placed under arrest for driving under the influence or aggravated driving under the influence; and (3) whether the person refused to submit to one or more required tests. *Indreland*, ¶ 18; Mont. Code Ann. § 61-8-403(4)(a)(i), (iv). Vallejo argues that the district court erred in holding a trial when the date on the citation and the date that came out in testimony differed. (Appellant's Opening Br. at 8). Discrepancies in a charging document are not one of the three issues this Court is permitted to review in a driver's license suspension case. *Indreland*, ¶ 18; Mont. Code Ann. § 61-8-403(4)(a)(i), (iv). That makes sense where a minor discrepancy in the charging document has no impact on the determination of whether a driver was lawfully arrested and refused to take the tests required by law.

Limitations on reviewable issues aside, the sufficiency standard for a charging document is only that a person of common understanding would know what was charged. *State v. Hocter*, 2011 MT 251, ¶ 16, 362 Mont. 215, 262 P.3d

1089. Even if the Court were permitted to review this issue, the discrepancy in the dates would not impact Vallejo's license suspension. The citation issued to Vallejo clearly states he was charged with violating Mont. Code Ann. §§ 61-8-401 and 45-7-303. (Pet'r's Ex. A.) There are no indications that Vallejo's understanding is or was impaired; in fact, his own testimony indicates his clear understanding of the charges against him.

Vallejo acknowledged that he received the citation, that he appeared in court on the charges contained in the citation, and that he defended himself against those charges with an attorney's assistance. (Tr. at 52-53.) Vallejo acknowledged he received the citation on February 26, 2019. (Tr. at 52.) Further, the district court observed that February 26, 2019, the date on which the events were said to have occurred, was a Tuesday. (Tr. at 56). Vallejo also testified the events occurred on a Tuesday. (Tr. at 54.) It is clear that Vallejo understood what happened, when it happened, and what was charged. The date discrepancy was simply a de minimis clerical error, as the district court noted. (Tr. at 57.) Therefore, even if the Court could review this issue, the citation meets the sufficiency standard for charging documents and would not have an impact on the suspension of Vallejo's license.

**V. The district court did not erroneously rely on hearsay evidence to support the revocation of Vallejo's driver's license.**

The district court allowed Sgt. Kazinsky to testify, over objection, that he “knew [Officer McLean] asked him to perform SFSTs, and that Mr. Vallejo declined.” (Tr. at 18.) Vallejo argues that the court erred in relying on Officer McLean's out-of-court statement to deny his challenge to his license revocation. This argument fails for two reasons. First, the court did not err in allowing Sgt. Kazinsky to testify that Officer McLean asked Vallejo to perform field sobriety tests. Sgt. Kazinsky's testimony did not involve hearsay because he did not testify to any specific statement made by Officer McLean. Mont. R. Evid. 801(c) (“Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”). Instead, Sgt. Kazinsky testified about his observations.

His testimony that Vallejo declined to take the tests also did not recount any specific out-of-court statement. Further, Vallejo's statements were admissible because a party's own admissions are not hearsay. Mont. R. Evid. 801(d)(2)(A). Therefore, the court correctly admitted Sgt. Kazinsky's testimony that Officer McLean asked Vallejo to take the field sobriety tests and he declined.

Second, contrary to Vallejo's assertion, the district court did not rely on Sgt. Kazinsky's testimony about Vallejo's refusal to perform field sobriety tests when upholding the suspension of his driver's license. When read in context, it is

clear that the court's finding that Vallejo "refused to participate in the testing," is a finding that he refused to take a breath test after his arrest. (Tr. at 70 (finding "you met the criteria for arrest set out in section 46-6-104 MCA. I will further find that you refused to participate in the testing, necessitating the issuance of a search warrant; and that that constituted a basis to suspend your driver's license under the implied consent law.")).) Thus, even if the court erroneously admitted hearsay about the field sobriety tests, it was harmless because it did not impact the court's conclusion.

Finally, Vallejo does not argue on appeal that the court erred in admitting hearsay evidence about Vallejo's refusal to submit to a breath test after his arrest. He even acknowledged in his petition that he refused to take the breath test. (Doc. 1 at 3.) He has failed to demonstrate that the court erroneously relied on hearsay evidence.

**VI. Vallejo waived his claim that there is no evidence the implied consent advisory was read.**

This Court will not review issues raised for the first time on appeal; to preserve a claim for appeal, the appellant must first raise the specific claim in the district court. *In re T.E.*, 2002 MT 195, ¶ 20, 311 Mont. 148, 54 P.3d 38. Vallejo did not raise the issue of the implied consent advisory to the district court. (Doc 1.) The first time he raises the issue is on appeal. (Appellant's Opening Br. at 10).

Because Vallejo did not raise this issue in the district court, he has waived his right to have it reviewed.

### **CONCLUSION**

The State respectfully requests this Court affirm the district court's denial of Vallejo's petition to reinstate his driver's license.

Respectfully submitted this 10th day of August, 2020.

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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 3,880 words, excluding certificate of service and certificate of compliance.

/s/ Mardell Ployhar

MARDELL PLOYHAR

## **CERTIFICATE OF SERVICE**

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-10-2020:

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