In the Supreme Court for the State of Montana
Supreme Court No. OP 22-0623

STATE OF MONTANA,

Petitioner,

v.

MONTANA FOURTH JUDICIAL DISTRICT COURT,
MISSOULA COUNTY, HON. JASON MARKS, Presiding,

Respondent.

DISTRICT COURT'S RESPONSE TO PETITION FOR WRIT OF SUPERVISORY CONTROL

From the Fourth Judicial District Court, Missoula County, Montana
State v. Tamara Lynn Brooks
Cause No. DC-21-568
Hon. Jason Marks

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INTRODUCTION

Comes now, the Honorable Jason Marks, District Judge, presiding over Cause No. DC-21-568, *State v. Tamara Lynn Brooks*, and responds to the State of Montana's Petition for Writ of Supervisory Control.

FACTUAL BACKGROUND

On October 18, 2021, Tamara Lynn Brooks was charged by Information with one count of DUI, 4th offense, a felony, in violation of Mont. Code Ann. § 61-8-401(1)(d). This charge was in response to the allegation that Ms. Brooks was driving on U.S. Highway 93 while under the influence on October 6, 2021. At the time the Information was filed, Ms. Brooks had two prior DUI convictions: one from 2002 out of Colorado and a second from 2011 out of Montana. Additionally, on February 15, 2022, after the Information was filed, Ms. Brooks was cited with another DUI, 3rd offense, in Missoula Municipal Court, Cause No. TK-2022-573.

On July 22, 2022, the State filed an Amended Information, intending to resolve all three outstanding DUI charges globally with this Court presiding. In the Amended Information, the State charged Ms. Brooks with Count I: DUI, 3rd offense, a misdemeanor, in violation of Mont. Code Ann. § 61-8-401(1)(a) and Count II: DUI, 4th offense, a felony, in violation of Mont. Code Ann. § 61-8-401(1)(a). Count I was in response to an allegation that Ms. Brooks was driving on Brooks Street while under the influence on August 6, 2021. Count II was in response to Ms.

Brooks' alleged conduct on October 6, 2021. At the time the Amended Information was filed, Ms. Brooks still had two prior DUI convictions, the pending DUI charges outlined in Counts I and II, and the pending DUI 3rd charge in Cause No. TK-2022-673. There was a proposed agreement that called for Ms. Brooks to plead guilty to Counts I and II in DC-21-568 and for the Missoula Municipal Court to dismiss TK-2022-573.

On August 8, 2022, this Court granted a Motion to Dismiss in *State v. Harwood*, Cause No. DC-22-119. In that case, the State stacked the defendant's one prior DUI conviction with her other two pending DUI charges in order to charge the defendant with DUI 4th. That matter was fully briefed, and the defendant argued that it was inappropriate for the State to stack her pending DUI charges under Montana's DUI statutes because they were not previous convictions. Based on the plain language of Mont. Code Ann. §§ 61-8-1008 and 61-8-1011, this Court agreed and held that the State lacked probable cause to charge the defendant with DUI 4th.

Here, similarly, the State stacked Ms. Brooks' pending DUI charge with her two prior DUI convictions in order to charge her with DUI 4th. On August 8, 2022, this Court dismissed Count II *sua sponte* for the same reason it granted the Motion to Dismiss in Cause No. DC-22-119: based on a plain reading, the State's ability to stack DUI charges is statutorily limited to final convictions that exist on the date of the offense charged. Thus, this Court determined that it erred in both its October 8,

2021 order and its July 22, 2022 order finding there was probable cause to charge Ms. Brooks with DUI 4th.

LEGAL STANDARD FOR A WRIT OF SUPERVISORY CONTROL

Article VII, § 2(2) of the Montana Constitution grants the Montana Supreme Court general supervisory control over all other courts.

> "Supervisory control is an extraordinary remedy that is sometimes justified when urgency or emergency factors exist making the normal appeal process inadequate, when the case involves purely legal questions, and when the other court is proceeding under a mistake of law and is causing a gross injustice, [or] constitutional issues of state-wide importance are involved . . . ."

M. R. App. P. 14(3). "Judicial economy and inevitable procedural entanglements [have been] cited as appropriate reasons for [the Montana Supreme Court] to issue a writ of supervisory control." *Stokes v. Mont. Thirteenth Judicial Dist. Court*, 2011 MT 182, ¶ 5, 361 Mont. 279, 259 P.3d 754 (citing *Truman v. Mont. Eleventh Judicial Dist. Court*, 2003 MT 91, ¶ 15, 315 Mont. 165, 68 P.3d 654).

ARGUMENT

This Court submits that a plain reading of Mont. Code Ann. §§ 61-8-1008 and 61-8-1011 statutorily limits the State's ability to stack pending DUI charges. This Court reads the statutes such that the State may only stack final convictions that exist on the date of the new offense charged.

I. A Plain Reading of Mont. Code Ann. §§ 61-8-1008 and 61-8-1011 Limits the State's Ability to Stack

This is a matter of statutory interpretation regarding the stacking of DUI charges under Montana law. When interpreting a statute, courts must construe statutory language according to its plain meaning. *Infinity Ins. Co. v. Dodson*, 2000 MT 287, ¶ 46, 302 Mont. 209, 14 P.3d 487. The Court does not "'insert what has been omitted,' or 'omit what has been inserted.'" *State v. Strong*, 2015 MT 251, ¶ 13, 380 Mont. 471, 356 P.3d 1078 (citing Mont. Code Ann. § 1-2-101 (2021)). However, if a statute is ambiguous, courts may look to the intent of the legislature in enacting the statute at issue. *Infinity Ins. Co.*, ¶ 46.

In 2021, the Montana Legislature passed major revisions and reorganized Montana's DUI laws. This Court believes the plain meaning of the relevant DUI statutes are unambiguous. The statute that delineates the penalty for DUI 4th and subsequent offenses states in relevant part:

> A person convicted of a violation of driving under the influence . . . who has also been convicted under either 45-5-106 or any combination of three or more convictions . . . [for] driving under the influence . . . is guilty of a felony . . . .

Mont. Code Ann. § 61-8-1008(1)(a) (2021). Clearly, the plain language states that a person is guilty of a felony when they are convicted of DUI and they have three or more prior DUI *convictions*, not charges or offenses.

Importantly, the Montana State Legislature codified the definition of a conviction for DUI purposes. That statute states, in relevant part, the following:

> (1)(a) For the purpose of determining the number of convictions for prior offenses referred to in 61-8-1001, 61-8-1002, 61-8-1007, and 61-8-1008, 'conviction' means:
>
> (i) a final conviction, as defined in 45-2-101, in this state, in another state, or on a federally recognized Indian reservation
>
> . . .
>
> (b) An offender is considered to have been previously convicted for sentencing purposes if less than 10 years have elapsed between the commission of the present offense and a previous conviction unless the offense is the offender's third or subsequent offense, in which case all previous convictions must be used for sentencing purposes.

Mont. Code Ann. § 61-8-1011 (2021) (emphasis added). Additionally, a final conviction is defined as follows:

> '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.

Mont. Code Ann. § 45-2-101(16) (2021).

Taken together, this Court understands the plain language of these statutes to limit the State's ability to stack to *previous convictions*—not pending charges. The Montana Legislature's choice to use the word "conviction" as opposed to "offense" must be given due weight. Further, the Legislature's choice to modify "conviction" with the word "previous" must be honored. Given the plain language of the rest of the statute, this Court reads "previous" to mean that, in order to count as a conviction

for sentencing purposes, a conviction must stand at the time of the "commission of the present offense." To be clear, although Mont. Code Ann. § 61-8-1011(1)(b) states "for sentencing purposes," the statute affects charging because, if a person may only be sentenced for previous convictions that exist at the time of the present offense, the State lacks probable cause to charge DUI 4th when a conviction for DUI 3rd does not exist at the time of that offense.

II. This Court did not Err in Dismissing Count II

A. Probable Cause & Timing

As a preliminary matter, this Court disagrees with the way the State framed the issue presented. The State's first argument heading reads "[t]he District Court erred in dismissing a charged based on lack of probable cause," and its second heading reads "[t]he issue of stacking DUI offenses is a sentencing matter and is not to be decided before sentencing." *Pet. for Writ of Supervisory Control* at 7, 11, Nov. 1, 2022, No. OP [hereinafter *Petition*]. These issues are interconnected, not separate: if the State did not have probable cause to charge DUI 4th, this Court's dismissal of that charge prior to sentencing was proper.

First, probable cause is a test of whether there is sufficient indication a person committed an offense. *See, e.g.*, *State v. Griffin*, 2021 MT 190, ¶ 11, 405 Mont. 78, 491 P.3d 1288. "The determination whether a motion to file an information is supported by probable cause is left to the sound discretion of the trial court." *State*

v. Bradford, 210 Mont. 130, 139, 683 P.2d 924, 928–29 (1984); *see also State v. Buckingham*, 240 Mont. 252, 256, 783 P.2d 1331, 1334 (1989).

The State argues that this Court's dismissal of Count II was inappropriate because it had probable cause to charge Ms. Brooks with DUI 4th, regardless of whether her DUI 3rd charge was still pending. *Petition* at 10. This Court disagrees and submits that the State did not have probable cause to charge Ms. Brooks with a DUI 4th. Again, this Court reads the relevant statutes *in toto* as limiting the State's ability to stack to convictions that exist at the time of the present offense. Here, Ms. Brooks was charged with Count II in the Amended Information, DUI 4th, for her alleged conduct on October 6, 2021, the "present offense." At that time, although Ms. Brooks had one pending DUI charge, she only had two previous DUI convictions. Without at least three convictions as of October 6, 2021, this Court found that the State did not have probable cause to believe that Ms. Brooks committed DUI 4th. Accordingly, this Court determined that it erred in granting leave to file both the original and Amended Information. To remedy that error, it dismissed Count II while leaving Count I for DUI 3rd intact.

Having determined that the State did not have probable cause to charge Ms. Brooks with DUI 4th, this Court now addresses the State's argument that the stacking of DUI offenses is "not to be decided before sentencing." *Petition* at 11. If the State brings a charge that is not supported by probable cause, this Court may

address that charge prior to sentencing. This logic is reflected both statutorily and by precedent. First, Mont. Code Ann. § 46-13-401(1) provides:

> (1) The court may, either on its own motion or upon the application of the prosecuting attorney and in furtherance of justice, order a complaint, information, or indictment to be dismissed. However, the court may not order a dismissal of a complaint, information, or indictment, or a count contained in a complaint, information, or indictment, charging a felony, unless good cause for dismissal is shown and the reasons for the dismissal are set forth in an order entered upon the minutes.

Here, this Court ordered the dismissal of a count contained in the Amended Information for good cause because the State lacked probable cause. This Court issued an order setting forth the reasons for dismissal of Count II. Therefore, under Mont. Code Ann. § 46-13-401, this Court's dismissal of Count II for lack of probable cause was not in error.

Second, precedent is instructive. When a person is charged with DUI 4th, but there is an issue concerning the number of prior convictions, that issue is properly decided prior to sentencing on a motion to dismiss. For example, the Montana Supreme Court has decided cases in which defendants file motions to dismiss felony DUI charges based on infirm priors. *See, e.g.*, *State v. Wolfe*, 2003 MT 222, ¶ 3, 317 Mont. 173, 75 P.3d 1271 ("Because Wolfe had been convicted of DUI on three prior occasions, the State charged the DUI offense as a felony . . . . Wolfe moved the District Court to dismiss the DUI charge, arguing that one of her prior DUI convictions was constitutionally infirm . . . ."); *State v. Joseph*, 2003 MT 226, ¶ 3,

317 Mont. 186, 75 P.3d 1273 (Joseph, who was charged with felony DUI because she had three prior convictions, filed a motion to dismiss in district court arguing that one of her prior convictions was constitutionally infirm); *State v. Chesterfield*, 2011 MT 256, ¶ 8, 362 Mont. 243, 262 P.3d 1109 (After being charged with felony DUI, Chesterfield filed a motion to dismiss, claiming his three prior convictions were constitutionally infirm); *State v. Cleary*, 2012 MT 113, 365 Mont. 142, 278 P.3d 1020.

This Court finds *Cleary* particularly instructive. There, the defendant was charged with felony DUI for a fourth lifetime alcohol-related driving offense. *Cleary*, ¶ 4. The defendant had three prior DUI convictions at the time of the fourth offense. After pleading not guilty, the defendant moved to have the felony charge dismissed, arguing that one of his prior DUI convictions was not actually a "conviction" because a South Dakota Magistrate Court exercised judicial clemency. *Id.*, ¶ 5. The district court denied the defendant's motion to dismiss. On appeal, the Court found that the South Dakota matter did not constitute a previous conviction. *Id.*, ¶ 25. Therefore, because the Court found the defendant only had two prior DUI convictions, it reversed and remanded.

Here, again, Ms. Brooks only had two previous convictions at the time of the October 6, 2021 offense. Although Ms. Brooks had not yet filed a motion to dismiss at the time this Court issued its order, dismissal of Count II was proper under Mont.

Code Ann. § 46-14-401(1) because the State lacked probable cause. Thus, in sum, the fact that this Court addressed stacking of DUI offenses in this matter prior to sentencing is supported under both Mont. Code Ann. § 46-14-401(1) and precedent concerning infirm priors.

B. Statutory Speedy Trial Concerns

Finally, in responding to the State's argument that stacking should only be addressed at sentencing, this Court notes its concerns regarding a defendant's statutory right to a speedy trial for a misdemeanor charge. Preliminarily, this Court agrees with the State that district courts have concurrent jurisdiction with justice courts over any misdemeanor punishable by a fine exceeding $500 or imprisonment exceeding six months or both. *See* Mont. Code Ann. § 61-8-1002 (2021). Because all DUIs involve fines of at least $500, district courts have concurrent jurisdiction over all DUIs.

Under Mont. Code Ann. § 46-13-401(2), once a plea is entered on a misdemeanor charge, courts must order the prosecution to be dismissed with prejudice if a defendant whose trial has not been postponed upon the defendant's motion is not brought to trial within six months, unless good cause exists. Accordingly, for DUI 1st though 3rd, misdemeanors, once a plea is entered, a six-month countdown begins. For DUI 4th or subsequent, a felony, the same time constraints do not apply.

Here, if this Court is correct, Ms. Brooks' DUI 4th, a felony, should have been charged as DUI 3rd, a misdemeanor. This affected this Court's decision to dismiss Count II sua sponte rather than wait for sentencing because to wait would have deprived Ms. Brooks of her statutory right to a speedy trial. For all of the foregoing reasons, this Court submits that its dismissal of Count II was appropriate and that it did not have to wait until sentencing to address the stacking issue.

III. Precedent Concerning Stacking for Other Criminal Offenses is Not Instructive

The State argues that this Court's dismissal of Count II directly contradicts the Montana Supreme Court's case law on stacking for other criminal offenses. *Petition* at 3. Specifically, the State argues that the Court has ruled on multiple occasions and through interpreting various statutes that pending charges may stack to reach a felony level. In support, the State cites *State v. Martz*, 2008 MT 382, 347 Mont. 47, 196 P.3d 1239, *State v. Tichenor*, 2002 MT 311, 313 Mont. 95, 60 P.3d 454, and *State v. Strong*, 2015 MT 251, 380 Mont. 471, 356 P.3d 1078.

While this Court acknowledges the Montana Supreme Court has previously interpreted various criminal statutes to allow for pending charges to stack, it has never so ruled regarding the DUI statutes at issue. This Court believes all three cases cited by the State are distinguishable from this matter based on the plain language of the relevant DUI statutes. First, in *Tichenor*, where stacking pending stalking charges was at issue, the Court held that "§ 45-5-220, MCA does not require that

there be a prior 'conviction' before the offender receives a felony sentence. Rather, the statute refers to a 'second or subsequent offense.'" *Tichenor*, ¶ 33. *Tichenor* is inherently distinct from this matter. Whereas the stalking statute uses the term "offense," the statutes at issue use the term "conviction." Therefore, *Tichenor* provides no support for the State's position that it may stack pending DUI charges.

Second, in *Martz*, where stacking pending PFMA charges was at issue, the Court held

> [I]n light of the facts existing at the time the information was filed in [this case], including the possibility of two convictions in DC 06-09, 'the maximum potential sentence which could be imposed' was the punishment set out in § 45-5-206(3)(a)(iv), MCA, for a 'third or subsequent conviction'. . . .

Martz, ¶ 28 (emphasis added). Again, this Court submits that *Martz* is distinct from this matter. Mont. Code Ann. § 61-8-1011 is written such that only previous convictions that exist at the time of the present offense may be used for stacking purposes. Again, the Montana Legislature's choice to use the word "previous" must be given due weight. Although the PFMA statute at issue in *Martz* does use the word "conviction," it is not accompanied by any modifier.

To exemplify this distinction, in *Martz*, there was probable cause to believe that the maximum possible sentence which could be imposed was for a third or subsequent PFMA conviction because the defendant had one prior conviction and three pending charges. In other words, because the PFMA statute does not limit

convictions to those that exist at the time of the present offense, the State had probable cause to believe the defendant could have three PFMA convictions by the time of sentencing. Dissimilarly, here, the maximum potential sentence for Ms. Brooks was for DUI 3rd because, at the time of the October 6, 2021 offense, she only had two previous DUI convictions. Therefore, should the Court agree with this Court's reading of Mont. Code Ann. § 61-8-1011, *Martz* provides no support for the State's argument.

Third, in *Strong*, where stacking pending indecent exposure charges was at issue, the Court held

> [the indecent exposure] stacking provision, making the third or subsequent conviction a felony, 'sets out the framework that a sentencing court must use when determining the proper sentence for a [defendant] who has been found guilty of one or more counts of indecent exposure,' and 'does not preclude a prosecutor from charging the misdemeanor counts as a predicate for the felony counts in the same information.'

Strong, ¶ 22 (citing *Blakely v. Eighteenth Judicial Dist. Court*, 2008 Mont. 743, at *4 (Nov. 26, 2008)). The Court went on to say that it "did not draw significance from the indecent exposure statute's language calling for enhanced penalties on 'a third or subsequent conviction,'" and that it found no limiting language. *Strong*, ¶ 22 (citing *Blakely* at *4) (emphasis added).

Like the PFMA statute in *Martz*, the indecent exposure statute is similar to the DUI statutes in that it says "conviction." However, as with the PFMA statute, the

indecent exposure statute does not contain a modifier for the term "conviction," nor is there a separate statute defining conviction. *See* Mont. Code Ann. § 45-5-504 (2021). In contrast, Mont. Code Ann. § 61-8-1011 makes it clear that, for the purpose of determining the number of convictions for prior DUI convictions, "conviction" means a final previous conviction that exists at the time of the present offense. Therefore, given the differences in the wording of the applicable statutes, the cases cited by the State do not support its argument that it may stack pending DUI charges.

IV. Legislative Intent

Finally, this Court responds to the State's reliance on the Montana Legislature's intent in this matter. When a statute's plain meaning is clear, a court should go no further—courts only rely on legislative intent when a statute is ambiguous. *Infinity Ins. Co.*, ¶ 46; *State v. Madsen*, 2013 MT 281, ¶ 8, 372 Mont. 102, 317 P.3d 806. Here, because the relevant statutes' plain meaning was unambiguous, this Court was bound to follow its plain language. Again, this Court reads the plain language to limit the State such that it may only stack previous DUI convictions that exist on the date of the present offense.

Even looking beyond the plain meaning, the State did not cite—and this Court could not find—any source specifically stating that the Legislature's intent was to allow for pending DUI charges to stack. The State only argued that the Legislature "explicitly" stated that its intent in enacting the DUI statutes was to protect the public

from repeat DUI offenders, citing to Mont. Code Ann. § 44-4-1202 (2021). This Court also notes that the Montana Supreme Court has echoed the public's disdain for repeat DUI offenders. *See, e.g.*, *State v. Blue*, 2009 MT 304, ¶ 21, 352 Mont. 382, 217 P.3d 82 ("This Court has for decades noted the public outrage toward the crime of drunk driving and the carnage caused by drunk drivers."); *State v. Spady*, 2015 MT 218, ¶ 11, 380 Mont. 179, 354 P.3d 590. This Court unreservedly agrees that drunk driving poses a substantial risk to public safety and that the State has a genuine interest in protecting the public from repeat DUI offenders. However, the fact remains that nothing the State cites contradicts this Court's plain reading of the statutes to limit stacking to previous convictions that exist at the time of the present offense.

Overall, this Court is not negating the important public policy goal of providing escalating penalties for repeat DUI offenders as the State suggests; rather, it is following the plain language of the statutes. *Petition* at 7. The Court hopes the Legislature will address the wording of these statutes in the upcoming session so that the courts may better hold offenders accountable when they commit multiple DUIs in quick succession.

CONCLUSION

This Court believes granting a writ of supervisory control is unnecessary because dismissal of Count II was appropriate under the circumstances. However,

given its interpretation of the plain meaning of the relevant statutes, this Court would be grateful for clarification regarding whether the State may stack pending DUI charges to reach a DUI 4th.

Respectfully submitted this ____ day of November, 2022.

_____
Hon. Jason Marks

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 11 and 14, M. R. App. P., the Respondent Montana Fourth Judicial District Court, Missoula County, the Honorable Jason Marks, Presiding Judge, hereby provides a Certificate of Compliance. The foregoing District Court's Response to Petition for Writ of Supervisory Control complies with the following:

___ Double Spaced (except for footnotes and indented material)

___ Proportionately spaced Times New Roman font of 14-point typeface

___ Does not exceed 4,000 words (Word Count: 3,864, as calculated by Microsoft Word, excluding tables, certificates, and appendices)

DATED this ____ day of November, 2022.

_____
Hon. Jason Marks

CERTIFICATE OF SERVICE

I, Jason Marks, hereby certify that I have served true and accurate copies of the foregoing District Court's Response to Petition for Writ of Supervisory Control to the following:

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DATED this ____ day of November, 2022.

_____
Hon. Jason Marks

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I, Jason Marks, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Other to the following on 11-15-2022:

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