IN THE SUPREME COURT OF THE STATE OF MONTANA

Cause No. DA 23-0023

CITY OF MISSOULA

Plaintiff and Appellee,

v.

MARK FOLLWEILER

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Leslie Halligan, Presiding

APPEARANCES:

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STATEMENT OF THE ISSUES

(1) Whether the district court erred when it concluded that two prior out-of-state DUI convictions must be counted to enhance Follweiler's Montana DUI sentence as a third offense.

(2) Whether Follweiler received ineffective assistance from his counsel, who failed to examine evidence in the record and argue that two prior out-of-state DUI convictions should not be counted to enhance his sentence as a third offense.

STATEMENT OF THE CASE

The City of Missoula charged Follweiler with DUI (drugs) for an offense that occurred on May 11, 2021. The City relied on two prior DUI convictions in Missouri and Pennsylvania to enhance his DUI sentence as a third offense.

Follweiler received ineffective assistance from his counsel, who failed to examine the Missouri DWI documents and argue that the prior DUIs should not be counted to enhance Follweiler's sentence as a third offense.

Follweiler motioned in city court to exclude the DUI convictions, arguing, in part, that they were too old and that the city failed to prove the statutes from the out-of-state DUI convictions are "substantially similar" to Montana's.

Missoula Municipal Court denied Follweiler's motion, ruling that the City's Response demonstrated "substantial similarity" between the out-of-state statutes and Montana's and that both convictions must be counted to enhance his DUI sentence in line with penalties for a third offense.

Follweiler appealed the decision to the Fourth Judicial District Court, which affirmed the municipal court's decision and remanded the case for sentencing consistent with its opinion.

Follweiler pleaded "nolo contendere" to the DUI offense, reserving the right to appeal, and the city court sentenced him to a third offense.

Follweiler timely appealed.

STATEMENT OF THE FACTS

Follweiler pleaded not guilty in Missoula Municipal Court to an

amended charge of DUI under Mont. Ann. Code § 61-8-401 (1) (b). (drugs) that occurred on May 11, 2021. (MMC 5/27/2021) The City relied on two prior DUI convictions in Missouri (2000) and Pennsylvania (2011) to enhance his sentence for a third offense. (MMC 1/26/2022)

Follweiler received ineffective assistance from his counsel, who failed to examine the Missouri DWI documents and argue that the prior DUIs should not be counted to enhance Follweiler's sentence as a third offense. (MMC 6/03/2022) (MMC 6/25/2022) (DC Doc. 4) (DC Doc. 8) (MMC 8/08/2022 at 6, ¶ 2)

Follweiler motioned, in city court, to exclude the out-of-state convictions on several grounds, including that the prior convictions are over ten years old (MMC 6/03/2022 at 1, ¶ 1) and that the prior DUIs were not charged as drug DUIs; thus were not similar to Montana's 'charges.' (MMC 6/03/2022 at 3, ¶3, at 4, ¶ 1)

The City argued that the DUI statutes in Pennsylvania in 2009 and Missouri in 1999 are "substantially similar" to Montana's because the measures of impairment and definitions of culpability in the respective statutes contained similar language. (MMC 6/21/2022 at 7-

12) The City included exhibits of documents related only to the Pennsylvania DUI, while the Missouri DWI documents were not included. (MMC 6/21/2024 at exhibits 1-8)

The Municipal Court denied Follweiler's motion, ruling, in part, that the City's response demonstrated "substantial similarity" between the out-of-state statutes and Montana's (MMC 8/08/2022 at 6, ¶2) (App. A) and that the "Defendant had two prior DUI convictions and if convicted a third time, both prior convictions shall be used for sentencing purposes." (MMC 8/08/2022 at 3) (App. A)

Follweiler pleaded "nolo contendere" and entered into a Plea agreement with the City, reserving sentencing pending appeal to the district court. (MMC 8/15/2022, Motion for Conditional Change of Plea)

Follweiler filed the "Motion and Brief RE: Out of State Charges" in the district court, arguing essentially the same grounds outlined in the city court motion, except he abandoned the "substantially similar" argument, retaining the argument of irregularities in the underlying Pennsylvania DUI records. (DC Doc. 4) His district court motion included records of the Pennsylvania DUI conviction only. (DC Doc. 5)

The City filed its response in district court with the same arguments outlined in its city court response, including an analysis of the out-of-state statutes similar to those of Montana. (DC Doc. 8 at 3-8) The City included exhibits of the Pennsylvania DUI (DC Doc. 9) and the Missouri DWI documents, consisting of a "Criminal Docket Sheet," "Guilty Plea with Counsel," and a two-page "Sentencing Order." (DC Doc. 10)

The district court affirmed the Municipal Court's denial of his motion and remanded the case for sentencing consistent with its opinion. (DC Doc. 12 at 2) (App. B).

Follweiler timely filed this appeal.

SUMMARY OF THE ARGUMENT

Follweiler pleaded "nolo contendre" in Missoula Municipal Court to a DUI (drugs) as a third offense. The City counted two prior convictions in Missouri and Pennsylvania to enhance his sentence to a third offense.

Follweiler's attorney motioned to exclude the out-of-state charges, but he did so without examining the evidence. Follwieler's counsel was

ineffective when he failed to argue, with supporting evidence in the record, that Follweiler's Missouri DWI is not a qualifying conviction.

Missouri's DWI statute does not contain any mandatory minimum sentence and allows for a fully suspended sentence, whereas Montana's DUI sentencing statute has no such provision. Missouri's DUI statutes are dissimilar to Montana's.

Once the Missouri DWI is ruled out as a non-qualifying conviction, the Pennsylvania DUI should be treated as a first conviction. This leaves Follweiler's Montana DUI to be sentenced as a second offense. Mont. Code Ann. § 61-8-734 requires a ten-year look-back for a second-offense DUI, not a lifetime, as would be the case if Follweiler's Montana DUI were a third offense.

The Pennsylvania conviction occurred on March 17, 2011. The Montana DUI offense occurred on May 11, 2021, ten years, one month, and twenty-four days after the Pennsylvania conviction. Therefore, the Pennsylvania conviction should not be counted because it falls outside the ten-year look-back period. Follweiler's Montana DUI should be

sentenced under the penalties of a first offense instead of the penalties of a third offense.

The district court did not review the evidence in the record to make a finding of fact that the City had, in fact, presented competent proof or that they had proven the prior convictions are "qualifying convictions" to count when enhancing his sentence to a DUI third offense.

Follweiler has a due process guarantee against sentences predicated on misinformation. The record indicates Follwieler's Attorney did not refute factual errors presented by the City, thereby prejudicing Follweiler when he received a harsher sentence with penalties for a third-offense DUI instead of a first-offense.

The district court ruled in error that the City must count two prior DUI convictions in Missouri and Pennsylvania to enhance his sentence to a third offense.

STANDARDS OF REVIEW

On appeal of a district court's appellate review of a lower court ruling, the lower court ruling is reviewed as if appealed directly to the

Court without district court review. *State v. Maile*, 2017 MT 154, ¶ 7, 388 Mont. 33, 396 P.3d 1270.

Upon independent review of the lower court record, the Court's standard of review is whether the lower court's findings of fact are clearly erroneous, whether its conclusions of law are correct, and, as applicable, whether the lower court abused its discretion. *State v. Davis*, 2016 MT 206, ¶¶ 5-6, 384 Mont. 388, 378 P.3d 1192.

A lower court's findings of fact are clearly erroneous only if not supported by substantial credible evidence; the lower court misapprehended the effect of the evidence, or the Court is left with a firm and definite conviction that the lower court was simply mistaken. *Maile*, ¶ 8.

The Court will generally defer to a lower court's findings of fact but review its conclusions of law and application of legal standards de novo. *State v. Kaufman*, 2002 MT 294, ¶ 12, 313 Mont. 1, 59 P.3d 1166.

Whether a prior conviction may enhance a criminal sentence is a question of law that we review for correctness. *State v. Krebs*, 2016 MT 288, ¶ 7, 385 Mont. 328, 384 P.3d 98.

Claims of ineffective assistance of counsel are mixed questions of law and fact, which the Court reviews de novo. *State v. Oliver*, 2022 MT 104, ¶ 21, 408 Mont. 519, 510 P.3d 1218.

ARGUMENT

I. The district court erred when it ruled that two prior out-of-state DUI convictions must be counted to enhance Follweiler's Montana DUI sentence to a third offense.

Follweiler pleaded "nolo contendre" in Missoula Municipal Court to a Driving Under Influence (drugs) charge under Mont. Code Ann. § 61-8-401(1)(b), a third offense. The City relied on two prior convictions, in Missouri (2000) and Pennsylvania (2011), to enhance his sentence to a third offense. (MMC 1/26/2022)

This court has provided direction when determining whether a prior conviction qualifies to enhance a DUI sentence to a third offense.

First, the City must prove by a preponderance of the evidence that the conviction is supported by "competent proof" that it occurred and that the record is complete and sufficient to show the type of DUI charged, the state law related to the charge, or judgment. *Krebs,* ¶ 19.

In *Cooper*, this Court held that "to present evidence of a prior

conviction in a sentencing proceeding, there must be competent proof that the defendant, in fact, suffered the prior conviction." *State v. Cooper*, 158 Mont. 102, 489 P.2d 99 (1971). This court's prior cases have found competent proof in a defendant's Certified Driving Record and the underlying court records. *State v. Letherman*, 2023 MT 196, ¶ 10, 413 Mont. 459, 537 P.3d 862 (citations omitted).

In the present case, although the record does not include Follwieler's Certified Driving Record or NCIC, the City submitted competent proof with copies of the underlying records. The parties relied solely on the underlying court records to make their arguments.

Second, once the City presents "competent proof," the defendant must overcome the "presumption of regularity" attached to prior convictions with direct evidence of irregularity in the underlying record. *State v. Mann*, 2006 MT 33, ¶ 15, 331 Mont. 137, 130 P.3d 164.

Follweiler concedes that the City provided competent proof of two prior out-of-state convictions and that no irregularity was present that would render the records unreliable.

Third, if the defendant is unsuccessful in refuting the City's competent proof, the City must still prove it is a "qualifying" prior conviction. *Krebs,* ¶ 2.

In *Krebs,* the defendant wasn't challenging the existence or validity of his 1988 DUI in Colorado; he was challenging whether it was a "qualifying conviction" that could be counted to enhance his penalty to felony status. The state had the burden to prove a qualifying conviction; however, they failed because the record was inadequate to demonstrate that the charge was for blood alcohol content instead of ' under the influence,' which mattered because a BAC conviction in Montana in 1988 could be expunged. *Krebs,* ¶ 19.

In the past, this Court has analogized sentencing procedures for multiple DUI convictions to those for repeat felony offenders. Mont. Code Ann. § 46-18-502; *State v. Nelson*, 178 Mont. 280, 284, 583 P.2d 435, 437 (1978).

As is the case here, it is common for defendants to disqualify an out-of-state conviction by comparing the statutes under which the conviction occurred to determine if they are "substantially similar" to

Montana's at the time of the offense. Mont. Code Ann. § 61-8-734(1)(a); *State v. McNally*, 2002 MT 160, 310 Mont. 396, 50 P.3d 1080.

When one state does not have an equivalent statute or provision similar to Montana's DUI laws at the time of the offense, the conviction may not qualify to count for enhancement of a DUI sentence. *State v. Cleary*, 2012 MT 113, ¶ 24, 365 Mont. 142, 278 P.3d 1020.

In the present case, Follweiler's attorney motioned to exclude the out-of-state charges in city court. (MMC 6/03/2022) However, he failed to examine the evidence in the record. As a result, the motion did not include arguments related to the Missouri DWI for the court to consider. As noted in the City's denial of the motion, Follweiler's counsel provided little legal argument or evidentiary support for the arguments he presented. The motions are riddled with conjecture, factual errors, and conclusions without a supporting legal argument. (MMC 8/08/2022 at 1, ¶ 2, at 2, ¶ 1, at 3, at 5, ¶2, at 6, ¶1, at 6 ¶2) (App. A) (MMC 6/03/2022) (MMC 6/25/2022) (DC Doc. 4) (DC Doc. 11)

A. The Missouri DWI Conviction

The statutory framework of Montana and Missouri establishes separate and distinct offenses for driving under the influence and for driving with excessive blood alcohol concentration. Mont. Code Ann. § 61-8-401 -714 (1999), (2009), (2021). Mont. Code Ann. § 61-8-406 -722 (1999), (2009), (2021). Mo. Rev. Stat. § 577.010 (1999), (App. C at 6) Mo. Rev. Stat. § 577.012 (1999), (App. C at 7). Missouri Code Manual, 1999-2000. (App. C at 8)

The Missouri DWI documents are competent proof consisting of three key documents: "Criminal Docket Sheet" (App. C at 2), "Guilty Plea with Counsel" (App. C at 3), and "Sentencing Order" (App. C at 4-5) (MMC 8/26/2022, records with Request for Transmittal, 1-4) (DC Doc. 10).

The "Criminal Docket Sheet" indicates Follweiler was charged and sentenced under Driving While Intoxicated, Mo. Rev. Stat. § 577-010 (b) (1999) by reference to charging code "47420". (App. C at 2) (App. C at 8) (MMC 8/26/2022, request for transmittal at 1-4) (DC Doc. 10). It should be noted that he was *not charged* with Mo. Rev. Stat. § 577-012 (b) (1999) (App. C at 2) code "47480", (App. C at 8) for Excessive Blood

Alcohol Concentration in line with Montana's BAC charge under Mont. Code Ann. § 61-8-406 (1999).

Montana's 1999 Driving Under Influence sentencing statute, Mont Code Ann. § 61-8-401, requires a minimum jail time of 24 hours and a minimum fine of $100 for a first-offense DUI. Missouri has no similar statute mandating 24 hours in jail or the required fine for a first offense DWI. The penalty for a first DWI in Missouri is a two-year fully suspended sentence on probation. (App. C at 6)

According to the Missouri DWI "Sentencing/Probation Order," dated January 11, 2000, Follweiler received a two-year suspended sentence, no jail time, and 100 hours of community service under Mo. Rev. Stat. § 577.010 (1999) for his Missouri DWI. (App. C at 4-5) This is a sentence outside the mandatory minimum sentencing parameters of the statute, as he did not serve 24 hours in jail and did not have to pay a minimum fine of $100.00. Mont. Code Ann. § 61-8-714 (1999).

The DUI sentencing statute Mont. Code Ann. § 61-7-714 (1999) provides an exception to the mandatory minimum jail time. "[T]he mandatory imprisonment sentence may not be suspended unless the

judge finds that the imposition of the imprisonment sentence will pose a risk to the defendant's physical or mental well-being." There is no evidence in the record that Follweiler could have been granted such an exception. (App. C at 2-5)

Follweiler's case is analogous to *Cleary* because the Missouri DWI sentencing statute is dissimilar to Montana's. In *Cleary*, this Court agreed with the defendant that the judicial clemency portion of the sentence in South Dakota had no similar counterpart in Montana and that such a disposition could not be equated to a conviction under Montana law for enhancement purposes. *Cleary,* ¶ 24. This Court said that they "decline to import into Montana a portion of an out-of-state DUI sentencing scheme, the remainder of which is not similar to Montana's DUI sentencing law." *Cleary,* ¶ 24.

Without the mandatory minimum 24-hour jail time, the Missouri sentence would be illegal in Montana because it falls outside the statute's parameters. Mont. Code Ann. § 61-8-714 (1999). The Missouri DWI conviction is not qualifying and should not be counted to enhance his sentence to a third offense.

B. The Pennsylvania DUI Conviction

Once the Missouri DWI is ruled out as a non-qualifying conviction, the Pennsylvania DUI should be treated as a first conviction. This leaves the Montana DUI to be sentenced as a second offense. However, Mont. Code Ann. § 61-8-734 (2021) requires a ten-year look-back for second-offense DUIs, not a lifetime, as would be the case if the Montana DUI charge were a third offense. Mont. Code Ann. § 61-8-734 (2021).

The Pennsylvania DUI conviction occurred on March 17, 2011. The Montana DUI offense occurred on May 11, 2021, ten years, one month, and twenty-four days after the Pennsylvania conviction.

Therefore, the Pennsylvania conviction should not be counted because it falls outside the ten-year look-back period. Follweiler's Montana DUI should be sentenced under the penalties of a first-offense DUI instead of those for a third offense. Mont. Code Ann. § 61-8-734 (2021).

In its opinion, the district court concluded that "[T]he opinion [in Cleary] makes it clear that Montana courts routinely consider foreign law. Notably, Mont. Code Ann. § 61-8-734 practically requires Montana

courts to consider foreign law when deciding whether an out-of-state DUI conviction arises from laws sufficiently similar to Montana's. " (DC Doc 12, page 12 ¶ 1) (App. B)

The district court concluded that Follweiler had not overcome the "Presumption of Regularity." (DC Doc 12, Page 10 ¶1) (App. B)

Without referring to the Missouri DUI records, the district court states, "The City explains that the Pennsylvania documents make this reference in implicit recognition of his 2000 DUI conviction in Missouri, which would make his Pennsylvania conviction his second. The Court finds this explanation very plausible- and much more plausible than Follweiler's curious explanation that it means he has two Pennsylvania DUI convictions and the City has no evidence of his first." (DC Doc 12, Page 10 ¶ 2) "In any case, the Court is unpersuaded by Follweiler's claim of irregularity. He had the initial burden here and *did not meet it*." (DC Doc 12, Page 11 ¶ 1) (App. B)

The district court did not comment on the City's conclusion (DC Doc. 12) (App. B) or the City Court's ruling, which stated, "Thus, this Court must conclude that the Missouri and Pennsylvania DUI statutes

are *substantially similar* to Montana's and that the Defendant had two prior DUI convictions." (DC Doc. 8, page 8, ¶ 5) (MMC 8/08/2022, page 6, ¶ 2)

The district court made no finding of fact about Missouri and Pennsylvania convictions as qualified to count to enhance Follweiler's sentence. The district court did not discuss the Missouri DUI specifically because Follweiler's counsel didn't present the evidence in the record. (DC Doc 12) (App. B)

The district court, nonetheless, remanded the case to Missoula Municipal Court for further proceedings consistent with this opinion" (DC Doc. 12 at 1 ¶ 3) (App. B)

II. Follweiler did not receive effective assistance from his counsel, who failed to examine evidence in the record and argue that two prior DUI convictions should not be counted to enhance his sentence to a third offense.

Defendants "may raise only record-based ineffective assistance of counsel claims on direct appeal." *State v. Pine*, 2023 MT 172, ¶ 34, 413 Mont. 254, 548 P.3d 390. This Court "distinguish[es] record-based from non-record-based claims based on whether the record fully explains why counsel took, or failed to take, a particular course of action." *State v.*

Meredith, 2010 MT 27, ¶ 51, 355 Mont. 148, 226 P.3d 571. "Where ineffective assistance of counsel claims are based on facts of record in the underlying case, they must be raised in the direct appeal and, conversely, where the allegations of ineffective assistance of counsel cannot be documented from the record in the underlying case, those claims must be raised by petition for post-conviction relief." *State v. White*, 2001 MT 149, ¶ 12, 306 Mont. 58, 30 P.3d 340.

This Court reviews IAC claims under the two-prong test the United States Supreme Court articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *State v. Mikesell*, 2021 MT 288, ¶ 19, 406 Mont. 205, 498 P.3d 192 (citations omitted).

Under the *Strickland* test, as restated by this Court, the defendant must show: "(1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant." *Avery v. Batista*, 2014 MT 266, ¶ 26, 376 Mont. 404, 336 P.3d 924. The burden falls on the defendant to overcome the presumption that the counsel's representation fell within a range of acceptable professional assistance.

State v. Wittal, 2019 MT 210, ¶ 11, 397 Mont. 155, 447 P.3d 1039 (citations omitted).

To overcome this presumption, the defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *State v. Garding*, 2020 MT 163, ¶ 16, 400 Mont. 296, 466 P.3d 501 (quoting *Whitlow*, ¶ 10).

Under the first prong of the *Strickland* inquiry, the Court determines the reasonableness of counsel's challenged conduct. *Avery*, ¶ 27. The Court examines "whether, in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." *State v. Whitlow,* 2008 MT 140 ¶ 16, 343 Mont. 90, 183 P.3d 861.

Strickland's second prong, the defendant must "demonstrate the existence of a reasonable probability that, but for counsel's unprofessional conduct, the result of the case would have been different." *State v. Jefferson*, 2003 MT 90, ¶ 53, 315 Mont. 146, 69 P.3d 641.

"Furthermore, the fact that counsel's challenged conduct may be categorized as "strategic" or "tactical" does not necessarily mean that the conduct was objectively reasonable. For example, the Supreme Court observed in *Strickland* that strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Whitlow*, ¶ 18.

Counsel must make reasonable investigations or a reasonable determination that makes a particular investigation unnecessary. *Whitlow,* ¶ 18.

Here, Follweiler's counsel did exhibit reasonable professional conduct when he did not conduct a reasonable investigation of the Missouri DWI "Sentencing Order" and "Docket Sheet." (App. C at 2-5) As a result, Follweiler's sentence was predicated on misinformation that his counsel did not refute.

"A convicted defendant has a due process guarantee against a sentence predicated on misinformation." *State v. McLeod*, 2002 MT 348, ¶ 16, 313 Mont. 358, 61 P.3d 126.

The record indicates many factual errors and misinformation in the City's Responses that Follweiler's counsel did not refute because he had not reviewed the record. (MMC 6/25/2022), (MMC 8/08/2022 at 6, ¶2).

For example, in the district court response, the city indicated that Missouri and Pennsylvania DUIs are charged with BAC only, which is not the case. "Further, neither statute requires the prosecutor prove a driver was impaired but only prove the defendant's BAC was over a certain level" (DC Doc. 8 at 8, ¶ 1). A review of the 1999 Missouri statutes and underlying DUI records indicates otherwise.

Like Montana, Missouri also has two statutes for charging DUI offenses found in Mo. Rev. Stat. § 577.010 (1999) for DWI and Mo. Rev. Stat. § 577.012 (1999) for BAC. Follweiler was charged under the impairment statute Mo. Rev. Stat. § 577.010, (1999). Furthermore, the

Missouri DWI record does not state Follweiler's BAC level. (App. C)

The city conveys to the district court another factual error: "Cleary is not applicable because neither of the Defendant's prior DUI convictions had a suspended imposition of sentence, and neither were vacated and ultimately expunged." (DC Doc. 8 at 16, ¶ 2).

However, this is not the case. The Missouri statute Follweiler was charged with is Mo. Rev. Stat. § 577.010 (1999) for Driving While Intoxicated, which has no similar sentencing statute in Montana in 1999. Montana's DUI sentencing statute for DUI contains a mandatory minimum of 24 hours in jail that must be served before the remainder can be suspended. Mont. Code Ann. § 61-8-401 (1999). Missouri's sentencing statute for DWI, Mo. Rev. Stat. § 577.010 (1999), is all suspended, with two years probation. Follweiler did not spend any time incarcerated for his DWI in Missouri. Instead, he received a fully suspended sentence, which would be illegal in Montana. (App. C at 6) (App. C at 4)

The City states in its city court reply, "Furthermore, the Defendant's criminal history shows a DUI conviction in Pennsylvania on March 17, 2011." (MMC 6.21.2022 at 3, ¶1)

However, the defendant's criminal history or certified driving records were not included as exhibits to support this statement, and these documents do not appear in the transmitted record. (MMC 6.21.2022), (DC Docs. 9, 10) (ROA Missoula Court, City v. Follweiler, TK-620-2021-001911)

The record indicates that the district court may have based some of its opinion on factual errors. "The City of Missoula had introduced evidence that Follweiler had previously been convicted for DUI, or something similar, in the State of Missouri in 2000 and the State of Pennsylvania in 2011 in Municipal Court." (DC Doc. 12 at 1, ¶ 4) (App. B)

However, a review of the city's response in city court shows that only the underlying Pennsylvania DUI documents were submitted as exhibits as competent proof of both out-of-state convictions. (MMC 6.21.2022 at Exhibits 1-8)

Follweiler's attorney submitted factual errors about the Pennsylvania DUI to both courts. In his motion to exclude out-of-state charges in city court, Follweiler's attorney claimed the underlying records were irregular and could not be relied upon because of cursive handwriting in portions of the documents when the records controverted his statements, as noted by the Municipal Court in its decision. (MMC 8/08/2022 at 1, ¶ 1), (App. A)

In the district court motion, Follweiler's counsel stated that "The City obtained files in Missouri and Pennsylvania, but the source of those files is unknown." (DC Doc. 4 at 4, ¶ 3)

However, this is not the case because, in a Request for Transmittal of the Records, Follweiler's attorney included records he had received from the City that showed exactly where the records had come from. (MMC 8/26/2022, Request for Transmittal)

In Follweiler's reply to the district court, his counsel submitted factual errors, "In its brief, the City alleged that the second DUI referred to in the Pennsylvania file was the result of Pennsylvania

using the Missouri offense." "However, the City provided absolutely no evidence that this was the case." (DC Doc. 11 at 2, ¶ 2)

However, this is not the case; counsel had the Missouri DWI records, as did the court. The City discovered this evidence and competent proof of the Missouri DWI first offense to defense. Included were documents indicating the subsequent Pennsylvania DUI charge counted as a second. The City did not rely on the Pennsylvania documents to substantiate Missouri's first DUI offense. It provided competent proof that Follweiler had been convicted of two DUIs. It was Follweiler's counsel's burden to prove that Missouri's DUI was not a "qualifying conviction," which he failed to do. (DC Doc. 9) (DC Doc. 10)

The negligence of Follweiler's counsel in not reviewing the evidence prejudiced Follweiler, placing him in county jail for 30 days instead of 1 day, increasing the fine from a maximum of $500 to the fine he received of $5,000, and extending his sentence jurisdiction to 12 months instead of 6 months among other sentence requirements for a third offense DUI, instead of a first offense DUI sentence. (MMC 8/23/2022)

CONCLUSION

Follweiler respectfully requests this Court to reverse the district court's denial of his Motion to Exclude Out-of-State Convictions and remand with instructions to proceed with effective counsel and to instruct the Missoula Municipal Court to modify Follweiler's sentence consistent with the opinion of the Court.

Respectfully submitted this 22nd day of July 2024.

Darcy Critchfield, Attorney at Law, PLLC
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By: /s/ Darcy Critchfield
Darcy Critchfield
Attorney for Mark Follweiler

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and quoted and indented material, and the word count calculated by Microsoft Word for Windows is 4,636, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance and Appendices.

APPENDIX

CERTIFICATE OF SERVICE

I, Darcy Ann Critchfield, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 07-22-2024:

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