IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0023

CITY OF MISSOULA,

Plaintiff and Appellee,

v.

MARK FOLLWEILER,

Defendant and Appellant.

BRIEF OF APPELLEE

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

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STATEMENT OF THE ISSUES

1. Whether Appellant's concededly valid January 11, 2000 DUI conviction from Missouri was under a statute similar to Montana's DUI statute for purposes of sentencing enhancement under Mont. Code Ann. § 61-8-734(1)(a) (2019).

2. Whether Appellant has met his burden of establishing that he was prejudiced by alleged ineffective assistance of counsel (IAC).

STATEMENT OF THE CASE

On May 11, 2021, the State charged Mark Follweiler (Follweiler) with DUI, in violation of Mont. Code Ann. § 61-8-401(1)(a) (2019), driving while suspended or revoked, in violation of Mont. Code Ann. § 61-5-212(1)(a)(i), and failure to carry insurance, under Mont. Code Ann. § 61-6-203(2).[1]

On January 26, 2022, the State filed a motion to amend the charges to DUI, third offense, under Mont. Code Ann. § 61-8-401(1)(b). (Doc. 1 at 45.) The State cited prior DUI convictions from January 11, 2000, and March 17, 2011.[2] (*Id.*) The municipal court granted the motion to amend on January 28, 2022. (*Id.* at 50.)

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[1] The citations are included in the district court record in the sealed folder named "DC-22-483 CITY v FOLLWEILER."

[2] The January 11, 2000 conviction was from Missouri. (Appellant's App. C.) The March 17, 2011 conviction was from Pennsylvania. (Doc. 1 at 92-99, labeled "Plaintiff's Exhibits" 1-8.)

On June 3, 2022, Follweiler filed a motion and brief to exclude the out-of-state convictions. (*Id.* at 65.) Citing Mont. Code Ann. § 61-8-1101(1)(b), Follweiler argued, "The City is attempting to use two out of state charges that are over 10 years old to charge the Defendant with a 3rd Offense DUI." (*Id.* at 65-66.)

On June 21, 2022, the State filed its response. (Doc. 1 at 75.) The State pointed out that Mont. Code Ann. § 61-8-1101(1)(b) did not go into effect until January 1, 2022, and the correct statutory cite was to Mont. Code Ann. § 61-8-734 (2019).[3] (*Id.* at 77 n.1.) The State compared Montana's 1999 DUI statute with Missouri's DUI statute at the time and argued that the statutes were similar "and virtually identical in the required elements a prosecutor must prove to obtain a conviction." (*Id.* at 85.)

On June 27, 2022, Follweiler filed a reply brief. (Doc. 1 at 100.) Again, he made no reference to the language used in Missouri's DUI statute. In his reply brief, Follweiler repeated his claim that Mont. Code Ann. § 61-8-1011(1)(b) "contemplates that a person have three or more offenses *prior to the 10 year period* before a look back can be used for purposes of sentencing." (*Id.* at 101 (emphasis in original).)

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[3] The language remained the same when the statute was renumbered, and states, in relevant part, that if "the offense is the offender's third or subsequent offense . . . all previous convictions must be used for sentencing purposes." Mont. Code Ann. § 61-8-734(1)(b) (2019). (*See also* Doc. 1 at 78.)

On August 8, 2022, the municipal court filed its written order denying Follweiler's motion to exclude the out-of-state charges. (*Id.* at 111.) The municipal court found that there was a substantial similarity between the Missouri DUI statute and Montana's DUI statute. (*Id.* at 116:6.)

On August 23, 2022, Follweiler entered a plea of nolo contendere to all three counts, reserving his right to appeal his motion to exclude out-of-state DUI convictions to the district court. (*Id.* at 126-27.)

On September 16, 2022, Follweiler filed his brief in the district court, stating:

> This matter concerns the interpretation of MCA 61-8-1011(1)(b) which was formerly MCA-61-8-734(1)(b). The statute will be referred [to] throughout the rest of the brief [] as it is currently numbered 61-08-1011(1)(b) to avoid confusion. This is a statute [] that allows out of State charges that are less than 10 years old to augment charges currently pending within the State of Montana. The Defendant contends that a plain reading of MCA 61-8-1011(1)(b) prevents the City from using charges that are over ten years old.

(Doc. 4 at 1.)

On October 13, 2022, the State filed its responsive brief. (Doc. 8.)

On November 14, 2022, the district court filed its order affirming the municipal court and denying Follweiler's motion to exclude out-of-state convictions. (Doc. 12.) Because Follweiler did not raise the issue, the district court did not address the municipal court's determination that the 2000 Missouri

conviction was under a DUI statute that was similar to Montana's. This appeal follows.

STATEMENT OF THE FACTS

At a hearing before the municipal court on July 31, 2022, Follweiler's attorney attempted to orally augment his brief to exclude prior DUI convictions. Like his brief, Follweiler's attorney's oral argument focused on the ambiguity of "the statute" [Mont. Code Ann. § 61-8-734]. (7/13/22 Hearing [Hr'g] at 01:20-02:13.)

The municipal court responded, "I didn't find the statute ambiguous at all." (*Id.* at 02:27-30.) After attempting to edify Follweiler's attorney on his misuse of the term "statute of limitations," the municipal court explained:

> What you're talking about is for sentencing purposes whether or not the court can consider previous convictions, and the statute is unambiguous. You didn't make any argument that the Pennsylvania statute or the Missouri statute is not substantially similar uh, to the Montana statute. In fact, the City made an argument doing the kind of analysis that, if you wanted to make that argument, you should have done.

(*Id.* at 06:04-34.)

The municipal court denied Follweiler's motions. (*Id.* at 14:51-15:03.) On August 8, 2022, the municipal court filed its written order denying Follweiler's motion to exclude out-of-state charges. (Doc. 1 at 111.) While the majority of the

order addressed issues not relevant to this appeal, the municipal court also found that the State had demonstrated a "substantial similarity" existed between the Missouri DUI statute and the Montana DUI statute. (*Id.* at 116.)

On August 15, 2022, Follweiler moved for a change of plea hearing. (*Id.* at 122.) On August 23, 2022, he entered a plea of nolo contendere to the charges pursuant to a plea agreement. (*Id.* at 119.) The municipal court sentenced Follweiler to 12 months at the Missoula County Detention Facility, suspending all but 30 days of that sentence. (*Id.* at 126.) The sentence was stayed pending appeal to the district court. (*Id.* at 162.)

On September 16, 2022, Follweiler filed his brief in Missoula County District Court. (Doc. 4.) Follweiler alleged that the municipal court did not have jurisdiction and that Mont. Code Ann. § 61-8-1011(b)(1) was unconstitutional. (Doc. 4 at 4-5.) He did not address whether the Missouri DUI statute was similar to the Montana DUI statute for purposes of sentencing enhancement.

On October 13, 2022, the State filed its brief. (Doc. 8.) The State compared Montana's 1999 DUI statute with the relevant Missouri DUI laws, and pointed out that they were "substantially similar and virtually identical in the required elements a prosecutor must prove to obtain a conviction." (*Id.* at 6.)

On October 26, 2022, Follweiler filed his reply. (Doc. 11.) The first sentence of his reply brief stated, "The City spent the majority of its brief discussing the

'substantially similar' standard even though that was not discussed in the Defendant's brief." (*Id.* at 1.) Follweiler then essentially repeated his allegations regarding the purported unconstitutionality of Mont. Code Ann. § 61-8-1011(1)(b). (*Id.* at 3-4.)

On November 14, 2022, the district court filed its order affirming the municipal court. (Doc. 12.) As Follweiler acknowledges, the district court did not address the municipal court's finding that the Missouri DUI conviction was under a similar DUI statute to Montana's because "Follweiler's counsel didn't present the evidence [or argument] in the record."[4] (Appellant's Br. at 18.)

SUMMARY OF THE ARGUMENT

The municipal court correctly determined that Follweiler's Missouri DUI conviction was under a statute similar to Montana's DUI statute. The words used in both statutes are synonymous and the statutes include virtually identical elements. Follweiler attempts to distinguish the statutes, claiming without authority

[4] The sentence Follweiler received would be illegal if this Court determines that the Missouri conviction was not under a statute similar to Montana's statute, as this would also preclude using the Pennsylvania conviction from 2011 for sentencing enhancement. (*See* Appellant's Br. at 16; *see also* Mont. Code Ann. § 61-8-714(1)(a) (2017) ("a person convicted of a first violation of 61-8-401 shall be punished by imprisonment for not less than 24 consecutive hours or more than 6 months").) Thus, despite his attorney's failure to raise the issue before the district court, Follweiler qualifies for appellate review pursuant to *State v. Lenihan*, 184 Mont. 338, 602 P.2d 997 (1979).

that since the Missouri DUI statute did not include a mandatory 24-hour jail sentence, as Montana's did at the time, the Missouri conviction cannot be used for sentencing enhancement. This is contrary to the unambiguous language of Mont. Code Ann. § 61-8-734, which contains no requirement that a prior conviction include an identical sentence to what the defendant would have received in Montana.

Because there is no legal authority to support Follweiler's argument, there is no basis to allege IAC for his counsel's failure to raise the argument that the Missouri DUI conviction statutes were not similar. The municipal court correctly determined that the corresponding DUI statutes were similar, and, because the current offense was Follweiler's third DUI, the State was required to use his Missouri conviction for purposes of sentencing enhancement. Even if Follweiler could establish IAC, he could not establish that he was prejudiced by his attorney's failure to pursue a meritless argument.

ARGUMENT

I. Standard of review

Whether a prior conviction can be used to enhance a criminal sentence is matter of law, which this Court reviews de novo for correctness. *State v.*

Wellknown, 2022 MT 94, ¶ 11, 408 Mont. 411, 510 P.3d 84 (citations omitted); *State v. Ailport*, 1998 MT 315, ¶ 6, 292 Mont. 172, 970 P.2d 1044.

IAC claims are mixed questions of law and fact, which this Court reviews de novo. *State v. Wright*, 2021 MT 239, ¶ 7, 405 Mont. 383, 495 P.3d 435 (citations omitted).

II. The 2000 Missouri DUI conviction was under a statute that was similar to Montana's DUI statute.

For purposes of determining prior convictions for DUI sentencing enhancement, "conviction" includes a "conviction for a violation of a similar statute or regulation in another state." Mont. Code Ann. § 61-8-734(1)(a) (2019). The determination of whether the defendant has been convicted in another state is to be made by reference to that state's law. *Ailport*, ¶¶ 18-19 (the judgment of a state should have the same credit, validity, and effect, in every other court of the United States, that it had in the state where it was pronounced).

In determining whether a prior conviction pertains to "a violation of a similar statute . . . in another state," this Court compares the out-of-state statute in effect at the time the offense was committed to the Montana statute in effect at that time. *State v. Polaski*, 2005 MT 13, ¶ 12, 325 Mont. 351, 106 P.3d 538 (emphasis omitted). "[I]f another state's law allows a person to be convicted using a lesser standard than would be required in Montana for a conviction, the statutes are not

similar for purposes of § 61-8-734(1)(a), MCA." *Polaski*, ¶ 22 (citing *State v. McNally*, 2002 MT 160, ¶ 22, 310 Mont. 396, 50 P.3d 1080).

Where Montana law has no counterpart to another state's DUI offenses because the other state's provisions provide for a lesser standard or "gradations of culpability," this Court has not found the necessary similarity to count the prior out-of-state conviction towards felony sentencing. *See State v. Young*, 2012 MT 251, ¶ 16, 366 Mont. 527, 289 P.3d 110; *McNally*, ¶¶ 22-23.

In *McNally*, for example, Montana had no counterpart and no "similar gradations of culpability" comparable to Colorado's driving while ability impaired (DWAI) statute, which allowed for a conviction by a lower standard than Montana's DUI statute. *McNally*, ¶ 22.

On the other hand, when out-of-state convictions were made under laws similar to Montana's DUI statute, this Court has affirmed using the prior convictions from those states as sentencing enhancements. *See, e.g., State v. Hall*, 2004 MT 106, ¶¶ 20-22, 321 Mont. 78, 88 P.3d 1273 (Washington DUI and per se offenses analogous to Montana's); *Polaski*, ¶¶ 20-22 (California's BAC and DUI statutes sufficiently similar to Montana's); *Young*, ¶¶ 13, 16 (Idaho's DUI statutory language "nearly identical to Montana's DUI statute").

For purposes of using a conviction for DUI sentencing enhancement, this Court has never required that another state's DUI statute be identical to Montana's.

See, e.g., Young, ¶¶ 18-19 ("essentially the same" standard; "similar enough"); *Hall*, ¶¶ 20, 22 ("analogous").

Follweiler concedes that the State provided "competent proof" that he was convicted of a DUI in Missouri. (Appellant's Br. at 10.) There is no question that the prior offense was a "conviction" in Missouri and would have been in Montana, as defined by Mont. Code Ann. § 45-2-101(16). *See, e.g., State v. Cleary*, 2012 MT 113, ¶ 24, 365 Mont. 142, 278 P.3d 1020:

> The South Dakota DUI does not meet this standard, as there was not a "conviction" in South Dakota as the term is defined under Montana law ("a judgment of conviction [and] sentence entered upon a plea of guilty or . . . upon a . . . finding of guilty . . . by a court of competent jurisdiction . . ." per § 45-2-101(16) MCA.

At the time of Follweiler's 2000 Missouri DUI conviction, Montana's DUI statute provided:

> 61-8-401. Driving under influence of alcohol or drugs. (1) 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 (1999).

"'Under the influence' means that as a result of taking into the body alcohol, drugs, or any combination of alcohol and drugs, a person's ability to safely operate a motor vehicle has been *diminished*." Mont. Code Ann. § 61-8-401(3) (1999) (emphasis added). "Diminished" means "that a person's ability to safely operate a vehicle is 'reduced or to a lesser degree.'" *State v. Olson*, 2017 MT 101, ¶ 16, 387 Mont. 318, 400 P.3d 214 (quoting *Polaski*, ¶ 22).

In Missouri, the relevant statute provides:

> 1. A person commits the crime of "driving while intoxicated" if he operates a motor vehicle while in an intoxicated or drugged condition.
> 2. Driving while intoxicated is for the first offense, a class misdemeanor. No person convicted of or pleading guilty to the offense of driving while intoxicated shall be granted a suspended imposition of sentence for such offense, unless such person shall be placed on probation for a minimum of two years.

R.S. Mo. § 577.10 (1999) (Appellant's App. C at 6.)

Missouri defines "intoxicated condition" as "under the influence of alcohol, a controlled substance, or drug, or any combination thereof." *State v. Walter*, 918 S.W.2d 927, 928 (Mo. Ct. App. 1996). "Missouri courts have also recognized that a driver is in an 'intoxicated condition' for purposes of a DWI prosecution if his use of alcohol [or drugs] *impairs* his ability to operate an automobile." *State v. Schroeder*, 330 S.W.3d 468, 475 (Mo. Ct. App. 2011) (citations omitted; emphasis added).

Whether an individual's ability to operate a motor vehicle is "diminished" or "reduced" by alcohol or drugs, as proscribed by Montana, or "impaired," as prohibited by Missouri, is a distinction with no discernable difference. The words are synonymous. As this Court determined while comparing similar language between the Montana and California DUI statutes,

> California's standard of "impaired to an *appreciable* degree" is not a lesser standard but rather would be a standard equal to or greater than our "diminished" standard. Therefore, California's and Montana's "under the influence" statutes are sufficiently similar for purposes of § 61-8-734(1)(a), MCA (2001). As a result of a similar standard in both California and Montana, Polaski could have been convicted in Montana in 1996, 1997 and 2001, for the same conduct for which he was convicted in California.

Polaski, ¶ 22 (emphasis and quotations in original).

Likewise, Missouri's standard of "impaired," is a standard equal or identical to Montana's "diminished" standard. Follweiler does not contend otherwise. Rather, he suggests that because Mont. Code Ann. § 61-8-401 (1999) required 24 hours of incarceration for a first-time DUI offense, and Missouri did not, the statutes were not similar for purposes of enhancement. (Appellant's Br. at 14-15.) Follweiler relies on dicta from *Cleary* to suggest that the South Dakota DUI statutes were not similar to Montana's because their respective sentencing provisions were not the same. (*Id.* at 15 (citing *Cleary*, ¶ 24).)

However, the issue in *Cleary* was that the defendant's prior DUI conviction had been expunged and removed from his driving record. *Cleary*, ¶ 10. This Court

held that the expunged South Dakota DUI did not meet the definition of a "conviction" for purposes of Mont. Code Ann. § 61-8-734(1)(a). *Id.* ¶ 24. This Court concluded, "Cleary's South Dakota offense was neither a conviction nor a sentence for Montana purposes, and that the expungement of the charge precludes it from being counted as a previous conviction for sentence enhancement purposes." *Id.* ¶ 25.

Follweiler does not contend his Missouri DUI conviction was expunged or removed from his record, nor could he. He admits that the State submitted "competent proof" that he had a prior "conviction" (Appellant's Br. at 10) and had been "sentence[d]" (*id.* at 14) for the DUI in Missouri. In other words, Follweiler has expressly conceded the issues that were contested in *Cleary*: "Cleary argues that he was never 'convicted' or 'sentenced' for the per se offense in South Dakota." *Cleary*, ¶ 20. Because Follweiler's 2000 Missouri DUI conviction was not expunged or removed from his record, this Court's holding in *Cleary* is inapposite.

The plain language of the statute defining what prior DUI convictions must be used for sentence enhancement states, in relevant part, "For the purpose of determining the number of convictions for prior offenses . . . 'conviction' means a final conviction, as defined in 45-2-101, in this state, [or a] conviction for a violation of a similar statute or regulation in another state . . . ." Mont. Code Ann.

§ 61-8-734(1)(a) (2019). Further, if the current offense is the defendant's "third or subsequent . . . *all previous convictions must be used for sentencing purposes*." Mont. Code Ann. § 61-8-734(1)(b) (2019) (emphasis added).

Lastly, "'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).

These statutes are unambiguous and contain no language that requires an out-of-state conviction to include a mandatory 24 hours of jail time as part of the sentence to qualify as prior convictions. The court in Missouri sentenced Follweiler after his plea of guilty to DUI under a statute similar to Montana's, and the current offense constituted his third or subsequent DUI. Therefore, the Missouri conviction "must" be used to enhance the sentence. Mont. Code Ann. § 61-8-734 (1)(b) (2019).

III. Follweiler has not met his heavy burden of establishing he was prejudiced by alleged IAC.

A. Applicable law

This Court reviews IAC claims by applying the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant arguing IAC has a

burden to demonstrate by a preponderance of the evidence that: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *State v. Valenzuela*, 2021 MT 244, ¶ 29, 405 Mont. 409, 495 P.3d 1061 (citing *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948).

If an insufficient showing is made regarding one prong of the test, there is no need to address the other prong. *Strickland*, 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*

To establish prejudice under the second prong of *Strickland*, a defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The likelihood of a different result must be "substantial." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

B. Follweiler has not shown IAC and cannot meet the prejudice prong of Strickland.

To support his claim of IAC, Follweiler alleges that his trial attorney "failed to examine the evidence in the record." (Appellant's Br. at 12.) "As a result, the motion [to exclude convictions] did not include arguments related to the Missouri DWI for the court to consider." (*Id.*) Follweiler elaborates, "It was Follweiler's

counsel's burden to prove that Missouri's DUI was not a 'qualifying conviction,' which he failed to do." (Appellant's Br. at 26.)

In the context of utilizing prior convictions for sentence enhancement, this Court has stated, "It is the State's burden to 'prove[] the fact of a prior conviction.'" *State v. Krebs*, 2016 MT 288, ¶ 18, 385 Mont. 328, 384 P.3d 98 (quoting *State v. Okland*, 283 Mont. 10, 17, 941 P.2d 431, 435 (1997)). "And the State must do so by presenting 'competent proof that the defendant in fact suffered the prior conviction.'" *Krebs*, ¶ 19 (quoting *State v. Lamere*, 202 Mont. 313, 321, 658 P.2d 376, 380 (1983)).

As Follweiler concedes, "[the State] provided competent proof of two prior out-of-state convictions and that no irregularity was present that would render the records unreliable." (Appellant's Br. at 10.) Therefore, the only question with respect to using the Missouri conviction for sentencing enhancement is whether it was under a statute that was similar to Montana's DUI statute at the time.

Follweiler's argument is that since Missouri did not require 24 hours of mandatory jail on a first time DUI, as was the case in Montana, the Missouri conviction did not qualify as a conviction that could be used for enhancement. (Appellant's Br. at 23.) This fails to acknowledge the plain language of the statutes that mandate when prior convictions "must" be used for DUI sentencing enhancement.

The explicitly stated requirements to use an out-of-state conviction for DUI sentencing enhancement were that the conviction was "for a violation of a similar statute or regulation in another state" (Mont. Code Ann. § 61-8-734(1)(a) (2019)), and that he was sentenced for that conviction[5] (Mont. Code Ann. § 45-2-101(16)). Follweiler's current argument that the Missouri conviction was required to include 24 hours of mandatory jail time to be used for sentence enhancement purposes is demonstrably meritless.

Montana Code Annotated § 61-8-734 does not require that a specific amount of jail time be served before a prior conviction may be used for DUI sentencing enhancement. The statutory definition of "conviction" requires that the individual has received "a judgment of conviction *and sentence* entered upon a plea of guilty . . . ." Mont. Code Ann. § 45-2-101(16) (emphasis added). There is no reference to the amount of jail time served in either statute. Further, there is no requirement that the sentence imposed be identical to what the defendant would have received in Montana.

Pursuant to Follweiler's plea of guilty (Appellant's App. C at 3), the Missouri court sentenced him on January 11, 2000 (*id.* at 5). Barring an expungement, Follweiler's Missouri conviction qualified for purposes of

[5] Because the Missouri conviction was from the year 2000, there was also a requirement that the current offense be his "third or subsequent." Mont. Code Ann. § 61-8-734(1)(b) (2019).

enhancing a "third or subsequent" DUI offense in Montana. Mont. Code Ann. § 61-8-734 (1)(b) (2019). When interpreting a statute, "the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." Mont. Code Ann. § 1-2-101.

Even if Follweiler could point to evidence supporting his assertion that his attorney "failed to examine the evidence in the record," it does not follow that his attorney was ineffective for failing to raise a meritless argument. "Counsel cannot be considered ineffective for failing to make a meritless objection." *State v. Hauer*, 2012 MT 120, ¶ 47, 365 Mont. 184, 279 P.3d 149. "On the contrary, it is well settled that counsel's 'failure to object does not constitute ineffective assistance when the objection lacks merit and properly would have been overruled.'" *Id.* (quoting *State v. Howard*, 2011 MT 246, ¶ 26, 362 Mont. 196, 265 P.3d 606).

Likewise, Follweiler has not shown a reasonable likelihood that his motion to exclude the Missouri conviction would have been granted if he had argued that since Missouri's DUI statute did not require 24 hours of jail time on a first offense, it was not similar to Montana's statute. As indicated, this argument is not supported by any legal authority, and it is demonstrably meritless based on the plain language of the relevant statutes.

Follweiler has not met his burden of showing IAC and has not met his burden to establish that he was prejudiced.

CONCLUSION

This Court should affirm Follweiler's sentence for DUI, third offense.

Respectfully submitted this 30th day of August, 2024.

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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 4,304 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Thad Tudor
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CERTIFICATE OF SERVICE

I, Thad Nathan Tudor, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 08-30-2024:

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