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State v. Moore Appellant's Reply Brief Dckt. 35486

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
 Plaintiff-Respondent,) NO. 35486
)
 v.)
)
 ALBERT R. MOORE,) REPLY BRIEF
)
 Defendant-Appellant.)

COPY

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

HONORABLE RONALD J. WILPER
District Judge

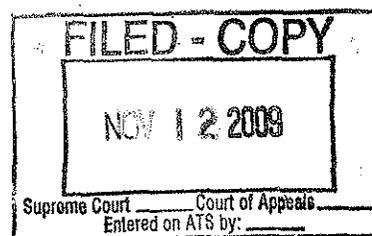
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STATEMENT OF THE CASE

Nature of the Case

In the Respondent's Brief the State asserts that Mr. Moore employed "an incorrect legal standard," contrary to Idaho code section 18-8005(8) and *State v. Schmoll*, 144 Idaho 800, 172 P.3d 555 (Ct. App. 2007), in arguing that his conviction for actual physical control was not substantially conforming. (Respondent's Brief, pp.3-6.) The State also argues that Mr. Moore's argument that his guilty plea to actual physical control was invalid is contrary to existing law and that counsel failed to cite directly contrary authority. (Respondent's Brief, pp.7-8.) This Reply Brief is necessary to address these assertions made by the State. Mr. Moore contends that the State has misinterpreted section 18-8005(8) and *Schmoll*, and that a proper application demonstrates that his conviction for actual physical control is not a substantially conforming conviction. Additionally, the State's representation that Mr. Moore's argument that his guilty plea was invalid is contrary to existing law, misrepresents the arguments made in the Appellant's Brief. Furthermore, a proper reading of the authority cited by the State reveals that it is not directly contrary authority. Mr. Moore refers this Court to his Appellant's Brief for his arguments on the remaining issues not addressed in this Reply Brief.

ISSUE

Was there sufficient evidence presented at trial to convict Mr. Moore of felony operating a motor vehicle while under the influence of alcohol?

ARGUMENT

I.

The Evidence Presented At Trial Was Insufficient To Support The Mr. Moore's Conviction For Felony Operating A Motor Vehicle While Under The Influence Of Alcohol

A. Introduction

In the Appellant's Brief, Mr. Moore argued that the district court erred in allowing the State to use his prior conviction for actual physical control of a vehicle because it was not a substantially conforming conviction, and that his guilty plea to this charge was invalid because it was obtained without counsel. In its Respondent's Brief, the State asserts that Mr. Moore employed "an incorrect legal standard" contrary to Idaho code section 18-8005(8) and *State v. Schmoll*, 144 Idaho 800, 172 P.3d 555 (Ct. App. 2007), in arguing that his conviction for actual physical control was not substantially conforming. (Respondent's Brief, pp.3-6.) The State also asserts that Mr. Moore's argument that his guilty plea to actual physical control was invalid is contrary to existing law and that counsel failed to cite directly contrary authority. (Respondent's Brief, pp.7-8.) Mr. Moore contends that the State has misinterpreted section 18-8005(8) and *Schmoll*, and that a proper application demonstrates that his conviction for actual physical control is not a substantially conforming conviction. Additionally, the State's representation that Mr. Moore's argument that his guilty plea was invalid is contrary to existing law, misrepresents the arguments made in the Appellant's Brief. Furthermore, a proper reading of authority cited by the State as directly contrary authority establishes that it is not directly contrary.

B. The North Dakota Statute Was Not Substantially Conforming With Idaho Code § 18-8004

In its Respondent's Brief the State asserts that Mr. Moore employed "an incorrect legal standard," contrary to Idaho code section 18-8005(8) and *State v. Schmoll*, 144 Idaho 800, 172 P.3d 555 (Ct. App. 2007), in arguing that his conviction for actual physical control was not substantially conforming. (Respondent's Brief, pp.3-6.) The State essentially argues that to determine whether a prior conviction for driving under the influence is a substantially conforming conviction, the courts should focus solely on the bare language outlining the elements of driving under the influence in the applicable statutes, without regard to how these elements have been defined within the applicable statute or by the courts. (Respondent's Brief, pp.3-6.) This argument misinterprets *Schmoll* and ignores the remainder of § 18-8004 defining the elements of driving under the influence.

In *Schmoll*, the Idaho Court of Appeals was asked to determine whether a felony driving under the influence conviction in Montana, which would have been treated as a misdemeanor conviction in Idaho if committed here, could be used as a prior felony to enhance a subsequent driving under the influence conviction in Idaho to a felony. *Id.* at 805, 172 P.3d at 560. In its analysis, the Court looked at how several other jurisdictions had determined whether a prior driving under the influence charge was substantially conforming. *Id.* at 801-03, 172 P.2d at 556-58. The Court noted the distinction between the approach in California, where the courts looked at the factual circumstances of the underlying conviction in determining whether the conviction was substantially conforming, and the approach taken in other jurisdictions, where the courts focused on

the elements of the offense rather than the underlying facts of the prior convictions or the penalties for the convictions. *Id.* The Court of Appeals ultimately rejected the approach taken by the California courts. *Id.* at 804-05, 172 P.3d at 559-60.

Notably, in *Schmoll*, although the Court of Appeals did compare the elements that constitute driving under influence in Montana and Idaho under the applicable statutes, implying they were substantially conforming, this was not the question before the Court. *Schmoll*, 144 Idaho at 804-05, 172 P.3d at 559-60. Instead the Court of Appeals found that the question before it was whether the violation would result in a misdemeanor or felony charge in Idaho, and that this question was “entirely independent” from whether Montana’s prohibition of driving under the influence substantially conforms to Idaho’s prohibition. *Id.* at 805, 172 P.3d at 560.

In the Respondent’s Brief, the State contends that *Schmoll* either expressly or implicitly rejected the idea that the Court should review how the applicable foreign statute has been interpreted by the courts of that state to determine if it is substantially conforming. (Respondent’s Brief, pp.6-7.) However *Schmoll* did not reject this idea, but in fact looked to how Montana had defined the elements of the crime through case law and the applicable statute. *Schmoll*, 144 Idaho at 804, 172 P.3d 555 (“A person is considered to be under the influence in Montana when his ‘ability to safely operate a vehicle has been diminished.’ M.C.A. § 61-8-401(3)(a). Diminished in this contest means ‘reduced or to a lesser degree.’”) (quoting *State v. Polaski*, 325 Mont. 351, 355, 106 P.3d 538, 542 (Mont. 2005)). Therefore, comparing how the elements of driving under the influence have been defined in each state to determine whether they are substantially conforming is not contrary to *Schmoll*. Furthermore, not looking to how a

jurisdiction has defined the elements of driving under the influence would lead to Idaho courts essentially interpreting other state's statutes for them despite contrary interpretations by that state.

The State's argument in the Respondent's Brief, also ignores other subsections of Idaho Code section 18-8004 further defining the elements of driving under the influence. (Respondent's Brief, pp.5-6.) As the State notes, under Idaho code section 18-8005(5), to be a substantially conforming foreign criminal violation, the violation of law in another jurisdiction must substantially conform "to the provisions of section 18-8004, Idaho Code." However, the State only compares one provision of Idaho Code section 18-8004, provision (1)(a), with the applicable North Dakota statute, despite the language in Idaho code section 18-8005(5) applying it to all of Idaho code section 18-8004 provisions. This analysis ignores Idaho Code section 18-8004(5), specifically stating that actual physical control "shall be defined as being in the driver's position of the motor vehicle with the motor running or with the motor vehicle moving." I.C. § 18-8004(5). It also ignores Idaho code section 18-8004(2), specifying that in Idaho a person with a blood alcohol content below .08 cannot be prosecuted for driving under the influence, unless they are also under the influence of drugs, driving a commercial vehicle, or are a minor. I.C. § 18-8004(2). The fact the legislature specifically sought to limit or define certain elements in Idaho code section 18-8004 and section 18-8005(5) states that a foreign conviction must substantially conform with the provisions of section 18-8004, not just subsection 18-8004(1)(a), indicates that the foreign conviction must be substantially conforming with these definitions or limitations as well. Here, Mr. Moore's

underlying conviction for actual physical control was not substantially conforming with either subsection 18-8004(2) or 18-8004(5). (See Appellant's Brief, pp.11-12, 13-14.)

Because the North Dakota elements for driving or being in actual physical control of a vehicle while intoxicated are not substantially conforming with Idaho code section 18-8004, and would allow convictions in much broader circumstances than in Idaho, the district court erred in denying Mr. Moore's motion in limine and allowing the North Dakota conviction to be used to enhance Mr. Moore's DUI to a felony. Therefore, the prosecution failed to present substantial competent evidence at the time of trial to find beyond a reasonable doubt that Mr. Moore was guilty of felony driving under the influence.

C. Mr. Moore's Guilty Plea In North Dakota Was Obtained Without A Knowing Voluntary Waiver Of His Right To Counsel

In its Respondent's Brief, the State asserts that Mr. Moore "argues that the state had the burden of proving that his waiver of counsel in North Dakota was knowing and voluntary," stating that this is contrary to law and that counsel failed to cite *Tovar v. Iowa*, 541 U.S. 77, 92 (2004) as directly contrary authority. (Respondent's Brief, pp.7-8 & n.3.) However, this was not the argument that was made in the Appellant's Brief and *Tovar* is not directly contrary authority as the State asserts.

In the Appellant's Brief, Mr. Moore made the following argument regarding the burden of proof to collaterally attack an uncounseled underlying conviction:

In order to make the required showing, the State is only obligated to prove the existence of the convictions through copies of the judgments of conviction or other evidence. *State v. Coby*, 128 Idaho 90, 92, 910 P.2d 762, 764 (1996). Once the State has met its burden, the defendant has the burden of coming forward with some evidence that the conviction was constitutionally defective. *Id.* However, if the defendant raises a triable

issue of fact that the defendant was not accorded all of their rights on the previous convictions, the burden is then on the State to rebut the defendant's evidence and prove there were no constitutional infirmities. *Miller*, 131 Idaho at 295, 955 P.2d at 610; *State v. Beloit*, 123 Idaho 36, 37, 844 P.2d 18, 19 (1992).

(Appellant's Brief, pp.15-16.) This argument is clearly not that the State has the burden to prove Mr. Moore's waiver was knowing and voluntary as the State asserts, but rather an explanation of how the Idaho Courts determine the respective burdens of the State and the defense. *State v. Miller*, 131 Idaho 288, 295, 955 P.2d 603, 610 (Ct. App. 1997). The burden shifts first from the State to the defense, and then from the defense to the State, only if a triable issue of fact is presented. *Id.* This standard was first adopted by the Idaho Supreme Court in *State v. Beloit*, 123 Idaho 36, 37, 844 P.2d 18, 19 (1992) *overruled on other grounds by State v. Weber*, 140 Idaho 89, 90 P.3d 314 (2004) following the United State's Supreme Court's Opinion in *Parke v. Raley*, 506 U.S. 20 (1992) and has not been overruled by the Idaho Supreme Court. *See Weber*, 140 Idaho at 94, 90 P.3d at 319.

In *Raley*, the issue before the United States Supreme Court was whether Kentucky's standard for determining the validity of a prior conviction was unconstitutional because the State was not required to carry the entire burden of proof. *See Raley*, 506 U.S. at 22. Under Kentucky's standard, which is similar to the standard adopted by the Idaho Supreme Court and argued by the Appellant in this case, the burden begins with the State to demonstrate that the existence of the conviction; the burden then shifts to the defense to produce evidence that his rights were infringed or some procedural irregularity occurred; if the defendant does this, the burden shifts back to the State to demonstrate that the judgment was entered in a manner protecting the

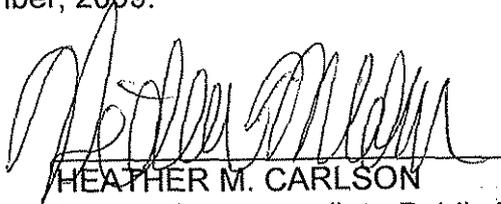
defendant's rights. *Id.* at 24. See *Beloit*, 123 Idaho at 37, 844 P.2d at 19; *Miller*, 131 Idaho at 295, 955 P.2d at 610; (Appellant's Brief, pp.15-16.). The Court ultimately held that this test did not infringe on the defendant's constitutional rights, leaving it up to the states to determine exactly what procedures they would proscribe as long as it did not infringe on the defendant's due process rights. *Id.* at 27-28.

Nothing in *Tovar* overrules this holding by the *Raley* Court. See *Tovar*, 541 U.S. 77, generally. The passage cited by the State from *Tovar* stating that "it is the defendant's burden to prove that he did not competently and intelligently waive his right to the assistance of counsel," is simply applying the burden of persuasion applied by the Iowa courts in the collateral attack of an uncounseled conviction by the defendant. *Tovar*, 541 U.S. at 92 (citing *Watts v. State*, 257 N.W.2d 70, 71 (Iowa 1977).). As *Tovar* originated in Iowa, and, as noted in *Raley*, the Supreme Court has left it up to the states to determine the procedures for implementing recidivism statutes, the Court would naturally apply the applicable Iowa law to determine what burden of persuasion applied to which party. *Raley*, 506 U.S. at 27-28, *Tovar*, 541 U.S. at 92. Therefore, *Tovar* is not directly contrary to the burdens of persuasion set forth in the Appellant's Brief, as the State has attempted to assert.

CONCLUSION

Mr. Moore respectfully requests that his judgment of conviction for felony driving under the influence be reversed because there was insufficient evidence to sustain his conviction for the felony enhancement. Alternatively, he contends that his judgment of conviction be vacated and his case remanded to the district court for further proceedings.

DATED this 12th day of November, 2009.

A handwritten signature in black ink, appearing to read "Heather M. Carlson", is written over a horizontal line.

HEATHER M. CARLSON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 12th day of November, 2009, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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