12-14-2011

State v. Schwab Respondent's Brief Dckt. 38797

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 38797
	)	
vs.	)	
	)	
LYNN LEWIS SCHWAB,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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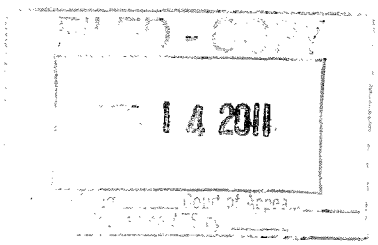

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Nature of the Case

Lynn Lewis Schwab appeals from the judgment and conviction entered upon his guilty plea to felony driving under the influence.

Statement of Facts and Course of Proceedings

After his September 2010 arrest in Boise, Idaho, the state charged Schwab with driving under the influence, driving without a valid driver's license, and failure to provide proof of insurance. (R., pp.32-33.) Because Schwab had two prior DUI convictions within the previous 10 years, the state charged him with felony DUI. (Id.); I.C. § 18-8005(6).

Schwab filed a motion in limine to prohibit the state from using his 2008 Montana DUI conviction to enhance his new DUI charge to a felony. (R., pp.47-75.) Specifically, Schwab argued that his prior Montana DUI conviction was entered in violation of his federal and Idaho constitutional rights to counsel and to be present at trial, and Montana statutory law. (R., pp.50-58.)

Following his 2008 Montana DUI arrest, Schwab made an initial court appearance, and was informed of his right to counsel. (R., pp.66, 123-124.) However, he told the court that he hoped to obtain private counsel. (R., pp.59, 123-124.) The Montana trial court ordered Schwab to "personally appear for

arraignment or trial."[1] (R., p.67.) Schwab then left Montana, never hired counsel, and never again appeared in a Montana court in his DUI case. (R., pp.59-60, 124.) Nor did Schwab ever contact the Montana trial court to request that counsel be appointed for him. (R., pp.86-87, 95.) After Schwab failed to appear at a Montana pre-trial, or, "omnibus" hearing, the court issued a bench warrant, scheduled a trial, and sent notice of the trial date to Schwab's address on record, "1101 Chamberlain St. Boise, ID 83706." (R., pp.68-69, 124.) Consistent with Montana law,[2] Schwab was tried and found guilty of misdemeanor DUI, *in absentia*, when he failed to appear at his scheduled trial. (R., pp.74, 124.)

Through his motion in limine and affidavits, Schwab alleged that he never provided the "1101 Chamberlain St." address to either the arresting officer or the Montana court, and instead provided his correct Fairfield, Idaho physical and mailing addresses. (R., pp.51-52; 60.) Schwab "believe[d] that the Chamberlain Street address was the address listed on [his] driver's license at the time of the Montana proceedings." (Id.) In addition, Schwab alleged that he believed the

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[1] While the Montana trial court's written "Order For Conditions Of Bail/Notice Of Hearing Or Trial" did not include a checkmark on the box labeled "Must Personally Appear For All Court Appearances" (R., p.67), the trial court later issued a bench warrant for Schwab's "Failure to Appear At Omnibus Hearing On 7/22/2008 at 10:00 AM As Ordered By The Court." (R., p.68.) Because the Montana trial court did not maintain transcripts or audio recordings of the proceedings in Schwab's DUI case, it is unclear when and how, if at all, the trial court specifically ordered Schwab to appear at the 7/22/08 hearing.

[2] Montana, by statute, provides courts with the discretion to proceed with a trial in a misdemeanor criminal proceeding without the defendant's presence, "[i]f the defendant's counsel is authorized to act on the defendant's behalf...or if the defendant is not represented by counsel." M.C.A. § 46-16-122.

Montana DUI charge was resolved when the assigned Montana prosecuting attorney called him and offered to amend the DUI charge to inattentive driving. (R., pp.51, 59-60.) Per that agreement, alleged Schwab, he would agree to plead guilty to inattentive driving, he would not have to travel back to Montana, and the prosecutor "would take care of the paperwork." (Id.)

The state investigated Schwab's claims. That investigation revealed that the "1101 Chamberlain St." address never actually appeared on Schwab's driver's license, and Schwab wasn't even able to present any driver's license to the arresting officer in Montana. (R., pp.86, 90, 97-106.) Instead, a sworn affidavit from the assigned Montana prosecutor indicated that Schwab had provided the false "1101 Chamberlain St" address to both the arresting officer, and to the court. (R., pp.91.) That sworn affidavit also indicated that the Montana prosecutor never contacted Schwab about his Montana DUI case, and never made an offer to amend Schwab's DUI charge to "inattentive driving" (a crime that does not exist in Montana). (R., pp.92-95.)

Following a hearing on the motion in limine in the present case, the district court, in a memorandum decision, concluded that Schwab intentionally provided false contact information to the Montana trial court, and thus waived his Sixth Amendment right to counsel in the Montana case through his conduct, specifically, by keeping himself "deliberately ignorant of the trial date." (R., pp.123-130; see generally Tr.) The district court then denied Schwab's motion in limine to strike the Montana DUI conviction. (R., pp.123-130.)

Schwab entered a conditional guilty plea to felony DUI, reserving his right to appeal the district court's denial of his motion in limine. (R., pp.142-144.) The district court sentenced Schwab to two years fixed, and five years indeterminate for the felony DUI, but suspended the sentence and placed Schwab on probation for seven years. (R., pp.150-155.) Schwab timely appealed. (R., pp.160-162.)

ISSUES

Schwab states the issues on appeal as:

1. Whether the District Court erred in denying Schwab's Motion in Limine where the record does not support a conclusion that the Montana Court followed Montana's statutory procedure for trying a defendant in a misdemeanor case *in abstentia* and without counsel?

2. Whether the District Court erred in finding the State had met its burden to demonstrate that Schwab's 2008 Montana DUI conviction, used to enhance his Idaho DUI charge to a felony, was constitutionally sound?

(Appellant's brief, p.6.)

The state rephrases the issue on appeal as:

Has Schwab failed to Show the district court erred in denying his motion in limine?

ARGUMENT

Schwab Has Failed To Show The District Court Erred In Denying His Motion In Limine

A. Introduction

Schwab contends that the district court erred in denying his motion in limine to prohibit his Montana DUI conviction from being used to enhance a later Idaho DUI charge to a felony. (See generally, Appellant's brief.) Specifically, Schwab contends that the district court should have entertained collateral attacks to his Montana DUI conviction on grounds beyond the alleged violation of his Sixth Amendment right to counsel, and that in any event, the district court erred in concluding that Schwab waived his Sixth Amendment right to counsel in the Montana case. (Id.)

However, Schwab's claims fail because under Idaho law, once the state makes a *prima facie* showing of the validity of a prior DUI conviction, a defendant may only challenge that prior conviction on Sixth Amendment right to counsel grounds. Further, the district court correctly found that Schwab waived his Sixth Amendment right to counsel with respect to the Montana case through his conduct of remaining willfully ignorant of the proceedings.

B. Standard Of Review

The standard of appellate review applicable to constitutional issues is one of deference to factual findings, unless they are clearly erroneous, but free review of whether constitutional requirements have been satisfied in light of the facts found. State v. Davis, 141 Idaho 828, 841, 118 P.3d 160, 173 (Ct. App.

2005); State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001).

C. Schwab Is Only Entitled To Challenge His Montana DUI Conviction On Sixth Amendment Grounds

Pursuant to I.C. § 18-8005(6), the state may enhance a defendant's third driving under the influence charge to a felony. To enhance a third charge of driving under the influence to a felony, the state must first make a *prima facie* showing of the existence of the prior two convictions upon which it relies. State v. Coby, 128 Idaho 90, 92, 910 P.2d 762, 764 (1996). This showing "requires only that the State produce the judgments of conviction or other evidence of the existence of the convictions." Id. After the state has produced the prior judgments of conviction, the defendant may challenge the use of the prior convictions by producing evidence establishing that one or more of the convictions was obtained in violation of his Sixth Amendment right to counsel. Id. Once the defendant raises a triable issue of fact concerning whether he was afforded his Sixth Amendment right to counsel, or that he did not properly waive the right, the burden of proof is then upon the state to rebut the defendant's evidence and convince the court that no violation of the defendant's rights occurred. Id.; State v. Beloit, 123 Idaho 36, 37, 844 P.2d 18, 19 (1992).

Schwab contends on appeal, as he did below, that he is entitled to attack his prior Montana DUI conviction not just on Sixth Amendment right to counsel grounds, but also pursuant to other federal constitutional rights, the Idaho Constitution, and Montana statutes. (Appellant's brief, pp.7-21.) Specifically, he

alleges that the state may not rely on his 2008 Montana conviction to enhance his new DUI because that conviction was entered contrary to M.C.A. § 46-16-122 (2)(d), his Idaho constitutional right to appear at trial in person and with counsel, and his federal constitutional right to appear at trial. (Appellant's brief, pp.8-10.)

However, it is clear that the only challenge that a defendant may make in these circumstances is one that the prior DUI conviction was entered contrary to a defendant's Sixth Amendment right to counsel. Custis v. United States, 511 U.S. 485, 496 (1994); State v. Weber, 140 Idaho 89, 90 P.3d 314 (2004); State v. Warren 135 Idaho 836, 840-841, 25 P.3d 859, 863-864 (Ct. App. 2001) (adopting the holding in Custis).

Prior to Custis v. United States, the Idaho Supreme Court expressed a willingness to consider collateral challenges to prior DUI convictions on grounds other than a defendant's Sixth Amendment right to counsel. Beloit, 123 Idaho at 37, 844 P.2d at 19 (recognizing that after the defendant raises a triable issue of fact concerning whether he was "accorded *all* of his rights," the burden is then upon the state to rebut the defendant's evidence and convince the court that "no violation of the defendant's rights occurred.") (emphasis added, citations omitted); see also State v. Maxey, 125 Idaho 505, 511, 873 P.2d 150, 156 (1994) (considering, approximately one month before the United States Supreme Court entered its opinion in Custis v. United States, defendant's claim that the guilty pleas he entered for his prior DUI charges were not made knowingly, intelligently, and voluntarily, and did not comply with the requirements of I.C.R. 11(c).).

However, in Custis v. United States, the United States Supreme Court held that a defendant's due process right to collaterally attack a conviction used for enhancement purposes in a subsequent proceeding is limited to the singular constitutional defect of failure to appoint counsel. Id. at 496. Therefore, pursuant to Custis, there is no constitutional right to challenge the constitutional validity of a prior DUI conviction on any other constitutional or statutory ground. See Partee v. Hopkins, 30 F.3d 1011, 1012 (8th Cir. 1994) ("[t]here is no federal constitutional right to collaterally attack a prior conviction used to enhance a sentence on any constitutional ground other than failure to appoint counsel for an indigent defendant."); State v. Veikoso, 74 P.3d 575, 580 (Hawaii 2003) (recognizing that in Custis, "the United States Supreme Court made it clear that a defendant's constitutional right to mount a collateral attack did not extend beyond situations where the prior convictions were obtained in violation of the right to counsel.").

The Idaho Court of Appeals adopted Custis in Warren, 135 Idaho at 840-841, 25 P.3d at 863-864. The state had utilized Warren's prior aggravated battery conviction to enhance his new felony charge pursuant to the Idaho persistent violator statute (I.C. § 19-2514). Warren, 135 Idaho at 838-839, 25 P.3d at 861-862. Warren argued that his trial counsel on the new felony was constitutionally ineffective for incorrectly advising him that he could not present evidence collaterally attacking his prior aggravated battery conviction on ineffective assistance of counsel grounds. Id. Citing Custis, the Idaho Court of Appeals recognized that "the United States Supreme Court held that a

defendant's due process right to collaterally attack a conviction used for sentencing enhancement purposes in a later proceeding is limited to the constitutional defect of failure to appoint counsel." Id. at 840, 25 P.3d at 863. The Idaho Court of Appeals then held that Warren had no constitutional right to challenge the validity of his prior conviction based upon a claim of ineffective assistance of counsel. Id. The Court also expressly declined to hold that Warren had any greater rights to collaterally attack his prior convictions under the Idaho Constitution. Id. at 841, 25 P.3d at 864.

In adopting Custis, the Idaho Court of Appeals referenced the policy concerns expressed by the United States Supreme Court:

> Ease of administration also supports the distinction [between Sixth Amendment challenges and other constitutional or statutory challenges to prior convictions]. As revealed in a number of the cases cited in this opinion, failure to appoint counsel at all will generally appear from the judgment roll itself, or from an accompanying minute order. But determination of claims of ineffective assistance of counsel, and failure to assure that a guilty plea was voluntary, would require sentencing courts to rummage through frequently nonexistent or difficult to obtain state court transcripts or records that may date from another era, and may come from any one of the 50 States.
>
> The interest in promoting the finality of judgments provides additional support for our constitutional conclusion. As we have explained, "[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures" and inevitably delay and impair the orderly administration of justice. (Citations omitted). By challenging the previous conviction, the defendant is asking a district court "to deprive [the] [state court judgment] of [its] normal force and effect in a proceeding that ha[s] an independent purpose other than to overturn the prior judgmen[t]." (Citation omitted).

Warren, 135 Idaho at 841, 25 P.3d at 864 (quoting Custis, 511 U.S. at 496-497).

Then, in Weber, 140 Idaho at 92-96, 90 P.3d at 317-321, the Idaho Supreme Court held that a defendant could not collaterally attack his prior DUI convictions pursuant to either I.C.R. 11, or constitutional standards intended to ensure that guilty pleas are knowing and voluntary. In so doing, the Idaho Supreme Court expressly overruled Beloit and Maxey "to the extent that [those opinions] appear to provide a basis for a defendant to collaterally attack the validity of prior DUI convictions on ground other than the denial of counsel." Weber, 140 Idaho at 96, 90 P.3d at 321. The Court also reiterated the policy considerations described in Custis and Warren, and added, "allowing a collateral attack on prior convictions on the basis of inadequate plea colloquies would force the sentencing court to look behind every conviction with practically no record to rely on." Weber, 140 Idaho at 94-95, 90 P.3d at 319-320 (quoting Kansas v. Delacruz, 258 Kan. 129, 139, 899 P.2d 1042, 1049 (1995)).

The present case illustrates the concerns expressed by the United States Supreme Court in Custis, the Idaho Court of Appeals in Warren, and the Idaho Supreme Court in Weber. The Montana trial court that presided over Schwab's Montana DUI proceedings did not maintain audio recordings or transcripts of those proceedings. (R., pp.56, 62.) In such a situation, a defendant may be able to challenge the validity of his prior DUI conviction and create a triable issue of fact simply by, as the district court concluded Schwab did in this case, submitting false affidavits. While this case involves the rare circumstance where even a Sixth Amendment challenge cannot quickly be resolved from "the judgment roll itself, or accompanying minute order," it is representative of the necessary

"rummag[ing] through frequently nonexistent or difficult to obtain state-court transcripts or records" that the United States Supreme Court sought to avoid.

The district court correctly recognized that the only challenge Schwab could make to his Montana DUI conviction was a Sixth Amendment right to counsel challenge. (R., p.126.) This Court should not consider additional grounds on appeal.

D. Schwab Has Failed To Show That The District Court Erred In Concluding That He Waived His Sixth Amendment Right To Counsel With Regard To His Montana Conviction

After the state made a *prima facie* showing of the existence and validity of Schwab's 2008 Montana DUI conviction, Schwab produced evidence, in the form of sworn affidavits, establishing a Sixth Amendment right to counsel challenge of the Montana conviction. (R., pp.50-75; 125-126.) The state rebutted Schwab's evidence with evidence of its own, that contradicted several of Schwab's assertions. (R., pp.80-117.)

The district court then concluded that pertinent factual allegations from Schwab's affidavits were false. (R., pp.123-130.) Specifically, the district court found Schwab intentionally provided a false address to the arresting officer and Montana court in order to keep himself willfully ignorant of the proceedings in the

Montana DUI case.[3] (Id.) The district court then concluded that Schwab had, through this conduct, waived his Sixth Amendment right to counsel with regard to his Montana DUI conviction. (Id.)

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to counsel during all critical stages of the adversarial proceedings against him or her. Estrada v. State, 143 Idaho 558, 562, 149 P.3d 833, 837 (2006); United States v. Wade, 388 U.S. 218, 224 (1967).

However, a defendant may waive his Sixth Amendment right to counsel through his conduct, and such a waiver may be implied. U.S. v. Murphy, 469 F.3d 1130 (7th Circ. 2009) (holding that a defendant who failed to provide financial information required to establish eligibility for court-appointed counsel, and who then failed to secure counsel during nine months between arraignment and start of trial impliedly waived his right to counsel, and recognizing that a defendant "may not use this [Sixth Amendment right] to play a 'cat and mouse' game with the court, or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the

[3] While Schwab indicates that he "disagrees" with the district court's factual findings (Appellant's brief, p.11), he does not contend on appeal that any of these findings were clearly erroneous. In any event, the credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003). In this case, the district court also found that Schwab's credibility was "further undermined" by the statements of the assigned Montana prosecuting attorney, who swore via affidavit that, contrary to Schwab's allegations, she never contacted Schwab and offered to amend the Montana DUI to "inattentive driving." (R., p.127.)

judge appears to be arbitrarily depriving the defendant of counsel") (quoting U.S. ex rel. Davis v. McMann, 386 F.2d 611, 618-619 (2nd Cir. 1967)).

Several courts have held that where a defendant fails to appear at a trial after being advised of the trial date, he waives his right to counsel through his conduct. In State v. Robertson 675 S.E.2d 732, 733 (S.C. 2009), the South Carolina Supreme Court held that when a defendant never appeared for a trial after being advised of the trial date, his "disregard for the instructions of the court, and his inexcusable absence from trial" constituted a "waiver by conduct of the right to counsel." In Jackson v. State, 868 N.E.2d 494, 496-497 (Ind. 2007), the defendant appeared at a scheduling conference, advised the court that he would be hiring an attorney, and was given a trial date. When the defendant failed to appear for the trial he was tried and convicted *in absentia*. Id. The Indiana Supreme Court held that the defendant, through his conduct, waived his right to counsel, and recognized that "a defendant cannot be permitted to manipulate the system simply by refusing to show up for trial." Id. See also Brewer v. Raines, 670 F.2d 117 (9th Cir. 1982) (The defendant received notice of his original trial date but failed to appear. After several continuances, he was convicted at a trial *in absentia* on a future date. The defendant did not receive notice of the continued trial date. The Ninth Circuit Court of Appeals held that the defendant waived, through his conduct, his Sixth Amendment right to confront witnesses and be present at trial, recognizing, "[a] defendant cannot be allowed to keep himself deliberately ignorant and then complain about his lack of knowledge."); State v. Weaver, 179 P.3d 534 (Mont. 2008) (where trial court notified

defendant's appointed counsel of trial date, and defendant then failed to appear at trial, the defendant waived his right to be present at trial because he either knew of the trial date and was willfully absent therefrom, or he "kept himself deliberately ignorant of that trial date").

While it is true that in Robertson, Jackson, Brewer, and Weaver, the defendant, or the defendant's counsel, had actual knowledge of at least the original trial date setting, the reasoning of those cases applies to a situation where a defendant keeps himself willfully ignorant of an original trial setting date as well. The Montana trial court ordered Schwab to be personally present at any trial. (R., p.67.) In his "cat and mouse" game, Schwab then provided false information to two courts. He willfully gave a false address to a Montana court in an attempt to avoid the criminal proceedings there, and he then provided false affidavits to an Idaho district court in order to cast doubt on the validity of his prior Montana conviction. This is the type of disregard, manipulation, and deliberate ignorance which led to a recognition of a defendant's waiver of his Sixth Amendment rights in Robertson, Jackson, Brewer, and Weaver.

The district court correctly concluded that Schwab had waived his Sixth Amendment right to counsel with regard to his Montana DUI conviction. This Court should thus affirm his conviction.

CONCLUSION

The state respectfully requests that this Court affirm the district court's order denying Schwab's motion in limine, and Schwab's conviction and sentence for felony driving under the influence.

DATED this 14th day of December 2011.

MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14th day of December, 2011, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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