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State v. Schwab Appellant's Reply Brief Dckt. 38797

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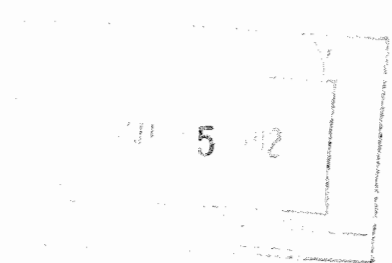
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)
)
Plaintiff-Respondent,)
)
vs.)
)
LYNN LEWIS SCHWAB,)
)
Defendant-Appellant.)
_____)

NO. 38797-2011



APPELLANT'S REPLY BRIEF

APPEAL FROM THE DISTRICT COURT OF
THE FOURTH JUDICIAL DISTRICT, ADA COUNTY

HONORABLE DARLA WILLIAMSON
District Judge presiding

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A. Introduction

Appellant Lynn Schwab (“Schwab”) submits this reply brief in support of his appeal from the District Court’s denial of his Motion in Limine, which sought to exclude a 1998 Montana driving under the influence (“DUI”) conviction from being used to enhance a later DUI charge to a felony in Idaho. It is the use of this un-counseled Montana DUI conviction---obtained at a trial held in Schwab’s absence and of which Schwab had no actual notice---that Schwab challenges.

B. Mr. Schwab Did Not Voluntarily Waive His Right to the Assistance of Counsel in His Montana Case and That Conviction Was Obtained in Violation of Mr. Schwab’s Sixth Amendment Right to Counsel

In his Montana case, “Mr. Schwab’s Notice of Bond Forfeiture and his Trial Notice were returned to the Court with a yellow stamp indicating the premises were Vacant and Unable to Forward.” R., pp. 94, 125. Thus, Mr. Schwab had *no notice* of his *trial* date and he had no counsel to represent him. The Montana court also did not advise Mr. Schwab that a trial might be initiated in his absence, nor did Mr. Schwab waive his right to be represented by counsel and/or to appear at trial. R., p. 60, at ¶ 6.

Mr. Schwab submits that the court should not infer a waiver of the right to counsel under these circumstances. The State cites several decisions in which courts have held that a defendant waives his right to counsel when he fails to appear for trial, “*after* being advised of the trial date.” Respondent’s Br., p. 14

(emphasis added). The critical difference between the cases cited and the instant case is that Mr. Schwab had *no actual notice* of his trial date. Nor did he have counsel who had been appointed and/or advised of a trial date.¹ Although the State is correct that the Montana court ordered that Mr. Schwab be present for trial, he did not receive notice of when that trial would be held. Thus, the circumstances in which courts have inferred a waiver of a defendant's right to counsel and/or to be present at trial, do not exist here.

Moreover, the Montana court record contains no finding that Mr. Schwab "had knowledge of the trial date and is voluntarily absent" as required by Montana law for a court to proceed with a trial in a defendant's absence. Mont. Code Ann. § 46-16-122 (2)(d); R., p. 62, at ¶ 3. Fortunately, Idaho only allows trials to continue without a defendant in very limited circumstances, (1) when a defendant who was initially present at trial "is voluntarily absent *after the trial has begun*" or (2) with a defendant's written consent in a misdemeanor case. Idaho Crim. R. 43

¹ Compare *State v. Weaver*, 342 Mont. 196, 199-200, 179 P.3d 532, 536 (2008) (Weaver had counsel who appeared at his trial, even though Weaver did not, and the Montana court took into consideration that Weaver had been ordered to maintain contact with his counsel when the court determined that Weaver waived his right to be present at trial by keeping himself deliberately ignorant and not keeping his "obligation to remain in contact with his counsel"). See also *State v. Hass*, No. DA 11-0132, 2011 WL 5966360, *1 (Mont. Nov. 29, 2011) (discussing the Montana statute and a defendant's rights to the assistance of counsel and due process and contrasting *Weaver*, which involved a right of presence claim, with *Hass*'s claim that his rights to counsel and to due process were violated).

(emphasis added). *See also State v. Walsh*, 141 Idaho 870, 873, 119 P.3d 645, 648 (Ct. App. 2005) (explaining that a defendant has a right to be present at every critical stage of the trial); *State v. Elliott*, 126 Idaho 323, 325, 882 P.2d 978, 980 (Ct. App. 1994).

The Idaho District Court made a determination under Montana's rules that Mr. Schwab was voluntarily absent, but the *Montana* court was required to do that prior to commencing the trial in Mr. Schwab's absence. There is no record of a deliberative process or a finding by the Montana court under Montana Code § 46-16-122 (2)(d). In short, the finding of voluntary absence, used to deprive a defendant of his constitutional rights to counsel and being present at trial, is one the Montana court needs to make to effect a valid conviction in a trial conducted without the defendant or counsel present. The Montana court's failure to make and/or document such a finding cannot be remedied by the Idaho District Court making those findings in the first instance on collateral attack. Considering the record before this Court, there is not sufficient evidence to find that the Montana court followed the procedure required by Montana law. Even if it did, to infer a waiver of the right to counsel in this circumstance is an attenuated result. Mr. Schwab was convicted at a trial held in his absence without the assistance of counsel.

A defendant has the right to assistance of counsel in all criminal prosecutions and this Sixth Amendment right is made obligatory on the states by the Fourteenth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335 (1963). *See also* IDAHO CONSTITUTION Art. 1, § 13 (providing that: “In all criminal prosecutions, the party accused shall have the right to a speedy and public trial . . . and to appear and defend in person and with counsel.”); *see also State v. Miller*, 131 Idaho 186, 188, 953 P.2d 626, 628 (Ct. App. 1998). Additionally, a DUI defendant in Idaho has the right to collaterally attack the constitutional validity of a prior DUI conviction if that prior conviction was obtained in violation of his right to counsel. *State v. Weber*, 140 Idaho 89, 94-95, 90 P.3d 314, 319 (2004).

Even setting aside all of Mr. Schwab’s other arguments, the record reveals that Mr. Schwab’s Montana DUI proceedings were conducted without the assistance of counsel. At no time was he adequately advised of the dangers of proceeding without counsel and at no time did he knowingly and voluntarily waive this right and elect to proceed without counsel.² *See Iowa v. Tovar*, 541 U.S. 77, 88, 124 S.Ct. 1379, 1387 (2004) (noting that any waiver of the right to counsel must “be knowing, voluntary, and intelligent”); *State v. Dalrymple*, 144 Idaho 628, 633, 167 P.3d 765, 770 (2007) (explaining that “[t]o be valid, a waiver of the right

² Mr. Schwab was informed of his right to counsel at his May 2008 court appearance.

to counsel must have been effected knowingly, voluntarily, and intelligently”) (citation and internal quotation marks omitted). Yet, he was tried and convicted without the assistance of counsel.

The District Court agreed that Schwab provided evidence of a constitutional infringement of his right to have counsel at his trial, R., p. 126, but determined this did not render his Montana conviction constitutionally defective. The District Court found that “Schwab intentionally provided an incorrect mailing address to the court” and his “failure to know of a trial date is directly attributable to his efforts to keep himself deliberately ignorant by providing a false address.” R., p. 127. Even if true, this does not amount to a waiver of the right to counsel or render Mr. Schwab’s uncounseled conviction, held in his absence, constitutionally sound such that Idaho courts should allow it to be used to enhance an Idaho charge.

C. Conclusion

Schwab respectfully submits that his 2008 Montana DUI conviction was obtained in violation of rights secured by the Idaho and United States Constitutions and without the findings required by Montana’s rules for conducting trials with a

defendant absent. Accordingly, he requests that this Court reverse the District Court's denial of his Motion in Limine.

Dated: January 5, 2012.




JAMES K. BALL
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on January 5, 2012, I caused to be mailed two true and correct copies of the foregoing Appellant's Reply Brief, in the United States mail with postage prepaid, addressed to:

MARK W. OLSON
Idaho Attorney General
Criminal Appeals Division
P.O. Box 83720
Boise, Idaho 83720-0010

A handwritten signature in black ink, appearing to read "James K. Ball", written over a horizontal line.

JAMES K. BALL,
MANWEILER, BREEN, BALL & HANCOCK, PLLC

