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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 09/16/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0608
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JOHN LLOYD CORDOVA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)
)
_____)

Appeal from the Superior Court in Mohave County

Cause No. CR-2008-0766

The Honorable Steven F. Conn, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Michael J. Mitchell, Assistant Attorney General
Attorneys for Appellee

Matthew J. Smith, Mohave County Attorney Kingman
By Jill L. Evans, Mohave County Appellate Defender
Attorneys for Appellant

S W A N N, Judge

¶1 John Lloyd Cordova ("Defendant") appeals his convictions of two counts of aggravated driving under the influence ("DUI"), each a class 4 felony. He claims that his 2007 Nevada conviction for DUI, an element of the present offenses, was not constitutionally obtained. Accordingly, Defendant contends that his convictions in this case must be reversed for lack of evidence of an essential element. But because prior convictions have a presumption of regularity, which Defendant failed to rebut, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 On June 27, 2008, Defendant was arrested for DUI in Mohave County, Arizona. He had previously been arrested twice for DUI offenses in Nevada: once in December 2007, with a conviction the same month; and again in April 2008, although he was not convicted of that offense until March 2009, after the June 2008 arrest.

¶3 On July 17, 2008, Defendant was indicted for two counts of aggravated DUI, with each count alleging that it was Defendant's third offense within the preceding 84 months. Count 1 alleged that Defendant was driving while under the influence of intoxicating liquor or any drug. Count 2 alleged that Defendant was driving with a blood-alcohol content of .08 percent or more.

¶14 On May 4, 2009, Defendant filed a motion to suppress evidence of his December 19, 2007 Nevada conviction, arguing that because he presented credible evidence that the conviction was not constitutionally obtained, the State was required to present proof to the contrary. Defendant premised his argument on *State v. McCann*, 200 Ariz. 27, 31, ¶ 15, 21 P.3d 845, 849 (2001), which held that the presumption of regularity attaches to a final judgment once the State has proven the existence of a prior conviction. If, however, a defendant presents credible evidence that a conviction is constitutionally infirm, the State is required to establish that the conviction was validly obtained. *Id.* Attached to Defendant's motion were certified documents purportedly "showing there was no written acknowledgment" that Defendant waived his right to an attorney. Defendant alleged that despite the lack of waiver, he signed a plea agreement without the assistance of counsel. He argued that because he had presented credible evidence of constitutional infirmity, the conviction must be suppressed unless the State established that the conviction was constitutionally obtained.

¶15 On May 19, 2009, the trial court held a hearing on Defendant's motion. Defendant testified that on December 10, 2007, he pled not guilty to the DUI charge and was asked to fill out a document titled "Waiver on Plea of Guilty or No Contest."

The pre-printed document requires a defendant to provide his name and date of birth, and acknowledge the charges against him, the potential consequences of a conviction, and other constitutional rights. Before each provision there is a space for a defendant to place his initials, acknowledging and verifying each statement. While Defendant initialed a majority of the provisions, he did not do so for the following:

3B.__I am represented by an attorney, or

3C.__I waive and give up my right to have an attorney represent me, and I exercise my right to represent myself.

. . . .

10.__I offer my plea of guilty or no contest freely and voluntarily, and I understand the nature of the charge against me and the contents of this Waiver.

¶6 Defendant stated that on December 19, 2007, when he returned to court to plead guilty, he did not believe that the judge asked him if he waived his right to an attorney. He also stated that he did not believe he waived his right to an attorney, and maintained that he had wanted an attorney. But the last page of the December 19, 2007 waiver form indicates that Defendant initialed the provision stating that he offered his "plea of guilty . . . freely and voluntarily," and that he understood "the contents of this Waiver."¹ He testified that he

¹ Defendant submitted only the last page of the critical December 19, 2007 document, which did not address the presence or waiver

did not recall whether he was asked to sign and initial the other pages of the December 19 waiver, but that if such pages had been given to him to sign or initial, he would have done so. A corresponding minute entry from the Nevada court stated, "WHEREAS, thereafter on the 19th day of DECEMBER, 2007, the defendant being present in court with his/her counsel [WAIVED], the above entitled court did adjudge the Defendant GUILTY "

¶17 Defendant also testified regarding his second (March 19, 2009) Nevada conviction. He pointed out the differences between the documents from the second conviction and the first. Unlike on the form from the first conviction, Defendant clearly affirmed that he was represented by an attorney or that he waived his right to an attorney on the second form. Further, the form regarding the second conviction indicates that Defendant's attorney signed the bottom of the last page, where he avowed that he was the attorney of record and that he had explained each of the above rights to Defendant. No such signature appears at the bottom of either the December 10 or December 19 forms from his first conviction.

¶18 After considering the evidence presented at the May 19 hearing, the trial court concluded the December 2007 conviction

of counsel. In contrast, all three pages were supplied for both the December 10, 2007 and March 19, 2009 forms.

was constitutionally obtained and denied Defendant's motion to suppress. The court explained its ruling as follows:

If one considers the checklist and the Defendant's testimony, it is difficult to conclude from those alone that the Defendant was advised of his right to an attorney and waived that right. The problem the Court has is that the Nevada paperwork includes a document entitled Judgment of Conviction (Plea) dated December, 2007, indicating "the defendant being present in court with his/her counsel [WAIVED]." . . . That sentencing order is an official document signed by the judge which has apparently never been challenged by the Defendant or someone on his behalf. Under the McCann case, there is a presumption of regularity that attaches to a final judgment. One could argue what exactly that means, but it seems at the very least that it would have to mean that if a judgment said a defendant waived his right to counsel, then he did waive his right to counsel. The fact that other court documents do not necessarily confirm that and that the Defendant testified under oath to the contrary does not convince the Court that the assertion in the judgment that the Defendant waived his right to counsel is incorrect.

¶19 Thereafter case was set for trial to begin on June 23, 2009. After a two-day trial, a jury convicted Defendant on both counts. Defendant timely appeals, and we have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1) (2010).

DISCUSSION

¶10 The single issue presented in this appeal is whether the trial court erred in denying Defendant's motion to suppress evidence of his 2007 Nevada DUI conviction. We review a trial

court's denial of a motion to suppress for abuse of discretion. *State v. Nelson*, 208 Ariz. 5, 6, ¶ 4, 90 P.3d 206, 207 (App. 2004).

¶11 In *McCann*, our supreme court examined whether the State was required to provide conclusive evidence that a prior conviction was constitutionally obtained before it could use that conviction to enhance a sentence or as an element of the offense. 200 Ariz. at 28, ¶ 1, 21 P.3d at 846. There the court adopted the reasoning in *Parke v. Raley*, 506 U.S. 20 (1992), which held that the law "does not prohibit a state court from presuming, at least initially, that a final judgment of conviction offered for purposes of sentence enhancement was validly obtained." 200 Ariz. at 29, ¶ 9, 21 P.3d at 847 (quoting *Parke*, 506 U.S. at 30). Mindful of a defendant's right to attack invalid prior convictions and of the State's burden to establish that a prior conviction was constitutionally obtained, the *McCann* court held:

When the State seeks to use a prior conviction as a sentence enhancer or as an element of a crime, the State must first prove the existence of the prior conviction. At that time, the presumption of regularity attaches to the final judgment. If the defendant presents some credible evidence to overcome the presumption, the State must fulfill its duty to establish that the prior conviction was constitutionally obtained.

Id. at 31, ¶ 15, 21 P.3d at 849.

¶12 Here, when the State presented evidence of Defendant's 2007 conviction, the presumption of regularity attached. The trial court found that Defendant failed to present credible evidence to overcome this presumption. To be sure, the absence of Defendant's initials on the December 10, 2007 pre-printed form, combined with the absence of an attorney's signature avowing that he informed Defendant of his rights, appear to indicate that he was not represented by counsel when he first plead not guilty. But Defendant's assertion that he did not waive such representation before pleading guilty is unsupported by any document. His assertion is also undermined by his initials on the last page of the December 19, 2007 form and his testimony that if he was asked to sign and initial the other pages of such form, he would have done so. And the minute entry expressly states that Defendant waived his right to counsel. Therefore, we cannot conclude that the trial court abused its discretion when it determined Defendant's uncorroborated statement failed to constitute "credible evidence" necessary to rebut the presumption of regularity.

CONCLUSION

¶13 For the foregoing reasons, we affirm the trial court's denial of Defendant's motion to suppress his 2007 Nevada conviction.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

SHELDON H. WEISBERG, Presiding Judge

/s/

JON W. THOMPSON, Judge