DA 18-0167

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 39N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROSS THOMAS INGMAN,

Defendant and Appellant.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DC-2016-95A
Honorable Holly Brown, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Christopher C. Petaja, Petaja Law, Bozeman, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant Attorney General, Helena, Montana

Marty Lambert, Gallatin County Attorney, Christopher Gregory, Deputy County Attorney, Bozeman, Montana

Submitted on Briefs: January 30, 2019

Decided: February 12, 2019

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Ross Thomas Ingman appeals the District Court's denial of his motion to dismiss, or, alternatively, to strike, the felony charge of driving under the influence of alcohol, a violation of §§ 61-6-401, -731, MCA (DUI), on the ground that one of his prior DUI convictions was constitutionally infirm, and thus could not be used to support a felony enhancement of the subject charge.

¶3 Ingman was arrested after police responded to a report of a vehicle driving over the center line, riding the shoulder of the road, and tailgating other vehicles. Ingman was determined to be the driver, and was charged with felony DUI based upon his three prior DUI convictions. Ingman filed a motion to dismiss the felony charge, claiming his 2012 DUI conviction upon guilty plea in Helena Municipal Court was constitutionally infirm because it had been obtained without advisement of, or a voluntary waiver of, his constitutional and statutory rights, including the "right to a jury trial, to confront witnesses against him, and not to incriminate himself."[1] The State responded and the District Court

[1] Ingman later clarified that his motion could be characterized as one to strike the enhancement of his pending charge from a misdemeanor to a felony. Also, Ingman's 2012 Helena Municipal Court conviction was later clarified to be for DUI "per se" under § 61-8-406, MCA.

conducted a hearing on the motion in which Helena Municipal Court Judge Bob Wood, who presided over Ingman's 2012 DUI proceeding, and Ingman testified. At the conclusion of the hearing, the District Court entered oral findings of fact and conclusions of law, and denied Ingman's motion.

¶4 The Due Process Clause of Article II, Section 17, of the Montana Constitution protects a defendant from being sentenced based upon misinformation, including a "constitutionally infirm prior conviction used for enhancement purposes." *State v. Rasmussen*, 2017 MT 259, ¶ 12, 389 Mont. 139, 404 P.3d 719 (affirming the district court's denial of defendant's challenge to a prior DUI conviction used for enhancement purposes). A rebuttable presumption of regularity attaches to the prior conviction, and courts will presume that the convicting court complied with the law "in all respects." *Rasmussen*, ¶ 14 (citation omitted). The defendant has the burden to overcome the presumption of regularity by producing affirmative evidence and persuading the court, by a preponderance of the evidence, that the prior conviction is constitutionally infirm. *Rasmussen*, ¶ 14. If the defendant satisfies this burden, the burden shifts to the State to rebut the defendant's evidence, but, nonetheless, the defendant retains the ultimate burden of proof "to both produce and persuade" that the conviction is invalid. *Rasmussen*, ¶ 14. Whether a prior conviction may be used for sentence enhancement is a question of law that we review de novo. *Rasmussen*, ¶ 10 (citation omitted). In determining whether a prior conviction is invalid, a district court "may first need to make findings of fact, based on oral and documentary evidence presented by the parties, regarding the circumstances of that

conviction." *Rasmussen*, ¶ 10. We will not disturb such findings unless they are clearly erroneous. *Rasmussen*, ¶ 10 (citation omitted).

¶5 Ingman presented affirmative evidence by affidavit and direct testimony that he was not advised of his rights before entering a guilty plea to DUI per se in the Helena Municipal Court in 2012, and the District Court found Ingman had satisfied "his initial burden" to challenge that conviction, which shifted the burden to the State to rebut Ingman's showing. Ingman argues the testimony of Helena Municipal Court Judge Bob Wood, who was called to testify by the State, "was not sufficient to meet the State's burden to prove by a preponderance of the evidence that the prior conviction was constitutionally sound." Ingman argues that, despite the Helena Municipal Court being a court of record, Ingman's change of plea hearing was not recorded. Further, while Judge Wood testified as to his general practice of giving a rights advisory to defendants at the time they enter a plea, Ingman notes that Judge Wood could not testify specifically that such a rights advisory was given to him when he entered a guilty plea in Helena Municipal Court in 2012.

¶6 In its oral findings, the District Court first considered a Municipal Court Arraignment and Advisement of Rights form admitted during Judge Wood's testimony, which was signed by Judge Wood on December 27, 2011. The form indicated that the defendant was advised of his rights. The District Court found that Ingman "probably did not view" a video explaining legal rights while he was detained in the jail, but that "he would have been personally advised by Judge Wood of his rights at the time he entered his first plea," which was a plea of not guilty. Ingman then retained private legal counsel, who

represented him throughout the proceeding, and filed motions on Ingam's behalf. Judge Wood set a hearing on the motions for April 23, 2012, but the motions hearing was changed to a hearing on a proposed change of plea by Ingman and his counsel. The District Court noted Ingman's testimony that his counsel did not advise him of the rights he was waiving by pleading guilty. However, the District Court found that Judge Wood testified "because this had been amended through a plea agreement . . . that he would specifically have advised Mr. Ingman about his rights and explain[ed] what it meant to plead to the per se charge," and that the rights included in the advisory would have been "the right to have a trial, or right to call witnesses, the right to speak or not speak, and the right to remain silent." The District Court noted that there were parts of the change of plea hearing Ingman did not recall, and that the testimony of Judge Wood about the hearing was to be credited. The court concluded that "the State has met [its] burden to support the constitutionality of the prior conviction," and that "Mr. Ingman would have been advised of [his] rights, and knowingly and voluntarily waived those rights."

¶7 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review, that the District Court's findings of fact are not clearly erroneous, and its interpretation and application of the law were correct. While Ingman points to testimony that he asserts was lacking or insufficient, we conclude the evidence found credible by the District Court was sufficient to support its findings.

¶8 Affirmed.

/S/ JIM RICE

We concur:

/S/ MIKE McGRATH
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ JAMES JEREMIAH SHEA