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CLERK OF THE SUPREME COURT
STATE OF MONTANA
Case Number: DA 17-0721

DA 17-0721

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 53

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DENIS LUND,

Defendant and Appellant.

APPEAL FROM: District Court of the Second Judicial District,
In and For the County of Butte-Silver Bow, Cause No. DC 16-175
Honorable Brad Newman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Deborah S. Smith, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Jeffrey M. Doud, Assistant Attorney General, Helena, Montana

Eileen Joyce, Silver Bow County Attorney, Samm T. Cox, Deputy County Attorney, Butte, Montana

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Submitted on Briefs: November 13, 2019

Decided: March 3, 2020

Filed:

Clerk

Justice Laurie McKinnon delivered the Opinion of the Court.

¶1 On March 23, 2017, Lund pleaded guilty to driving under the influence of alcohol (DUI), fourth offense, a felony under § 61-8-401, MCA. Lund appeals the order denying his motion to dismiss entered by the Second Judicial District Court, Butte-Silver Bow County. Lund presents the following issue for review:

> *Are the Montana and Alaska DUI statutes similar within the meaning of § 61-8-734(1)(a), MCA, qualifying Mr. Lund's three prior Alaska DUI convictions as predicate offenses for felony enhancement under § 61-8-731(1), MCA?*

¶2 We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶3 On September 26, 2016, Lund was charged by information with felony DUI and related driving offenses. The DUI charge was elevated to a felony because Lund was convicted of three prior DUIs in Alaska on June 27, 2003, September 23, 2007, and August 19, 2009.

¶4 Prior to trial, Lund filed a motion to dismiss arguing the Montana and Alaska DUI statutes were dissimilar. After comparing the two statutes and analyzing Alaska case law, the District Court found that they were sufficiently similar and denied Lund's motion. In comparing the laws, the District Court determined, "the Alaska and Montana 'under the influence' standards are essentially the same. Both statutes require proof of more than mere drinking and driving. Both statutes require proof that the consumption of alcohol negatively impacted a person's ability to drive safely or prudently."

¶5 After the District Court's denial, the parties reached an agreement whereby Lund pleaded guilty to felony DUI and reserved his right to appeal the District Court's denial of his motion to dismiss. The State agreed to dismiss the remaining charges. The District Court sentenced Lund to the Montana Department of Corrections WATCh program for a period of 13 months, followed by a two-year suspended sentence and a fine. Lund's sentence was stayed pending the outcome of this appeal.

STANDARD OF REVIEW

¶6 Absent a factual dispute, a decision on a motion to dismiss is an issue of law that this Court reviews de novo for correctness. *State v. Barrett*, 2015 MT 303, ¶ 6, 381 Mont. 299, 358 P.3d 921. Whether a prior conviction can be used to enhance a criminal sentence is an issue of law, which this Court reviews de novo for correctness. *State v. Krebs*, 2016 MT 288, ¶ 7, 385 Mont. 328, 384 P.3d 98.

DISCUSSION

¶7 Lund claims that his Montana conviction for felony DUI in 2016 was erroneous because it was based on previous DUI convictions from Alaska on June 27, 2003, September 23, 2007, and August 19, 2009, under an Alaska statute which is dissimilar to Montana's DUI statute. If Alaska's DUI statute under which Lund was convicted is deemed "similar" to Montana's DUI statute, Lund's 2016 DUI constitutes a fourth DUI offense, rendering it a felony under § 61-8-731(1), MCA.

¶8 Section 61-8-734(1)(a), MCA, establishes how to determine the number of DUI convictions a person has accumulated. The relevant portion of this statute

states: "[f]or the purpose of determining the number of convictions for prior offenses referred to in . . . 61-8-731, 'conviction' means a final conviction, . . . for a violation of a similar statute or regulation in another state . . . ." In *State v. McNally*, 2002 MT 160, ¶ 22, 310 Mont. 396, 50 P.3d 1080, we concluded that if another state's law allows a person to be convicted using a lesser standard of impairment than would be required in Montana for a conviction, the statutes are not similar for purposes of § 61-8-734(1)(a), MCA.

¶9 Lund argues that Alaska law allows a person to be convicted of DUI under a lesser standard of impairment than required in Montana and, therefore, none of Lund's three prior Alaska DUI convictions qualifies as a predicate offense for felony enhancement under § 61-8-731(1), MCA. Initially, though not dispositive, it is important to note the Alaska Court of Appeals has determined its DUI statute, AS 28.35.030(a)(1), is similar to Montana's DUI statute, § 61-8-401, MCA. *See State v. Simpson*, 53 P.3d 165, 171 (Alaska App. 2002). Lund however, argues the District Court erred in concluding Alaska's and Montana's "under the influence" standards are "essentially the same." Lund relies on *Molina v. State*, in which the Alaska Court of Appeals compared its own DUI statute with Arizona's DUI statute and found them to be similar. 186 P.3d 28, 29 (Alaska App. 2008). Lund further relies on this Court's decision in *McNally*, where we compared our own DUI statute with Colorado's, ultimately finding them dissimilar. *McNally*, ¶ 22. Colorado's statute uses language similar to Arizona's statute. Lund argues that, because Alaska has determined its standard for "under the influence" is "essentially the same" as Arizona's standard, and Montana's standard has been determined by this Court to be dissimilar to

Colorado's standard, which uses similar language to Arizona's standard, it necessarily follows that Montana and Alaska's standards are dissimilar. This logic fails, as set forth below.

¶10 In *Molina,* the Alaska Court of Appeals concluded that the Arizona DUI statute requires proof of essentially the same level of impairment as Alaska's DUI statute. *Molina*, 186 P.3d at 30. Arizona defined its prohibited level of impairment as, "impair[ment] to the slightest degree." *Molina*, 186 P.3d at 30 (citation omitted). In recognizing the similarity of Alaska and Arizona's standards, the Alaska Court of Appeals reasoned, "[b]oth tests require proof that, because of the influence of intoxicants, the operator of a motor vehicle was deprived to a perceptible degree of their normal mental and physical capacity to control the vehicle." *Molina*, 186 P.3d at 30.

¶11 In *McNally*, the appellant argued his prior convictions for driving while ability impaired (DWAI) did not constitute prior convictions for sentence enhancement to felony DUI under § 61-8-734, MCA. *McNally*, ¶ 3. This Court looked to the legislative history of the 1987 amendments to § 61-8-401, MCA, wherein the legislature rejected a proposal that "under the influence" should mean that, "as a result of taking into the body alcohol, drugs, or any combination thereof, a person's ability to safely operate a motor vehicle has been *lessened to the slightest degree*." *McNally*, ¶ 20. (Emphasis supplied). Instead, the language was changed to "diminished." This Court noted, "the legislature recognized a distinction between the two degrees of impairment." *McNally*, ¶ 20. We concluded such

a distinction evidenced Montana's standard for "under the influence" was dissimilar from Colorado's standard, stating:

> In Colorado, a person is "driving under the influence" if he or she is "substantially incapable" of safely operating a vehicle, while a person is "driving while impaired," if his or her ability to drive is affected to the "slightest degree." Montana law does not permit similar gradations of culpability. In Montana, a person simply may not be convicted for DUI if his or her ability is impaired "to the slightest degree." *McNally*, ¶ 20.

We further explained that McNally had a conviction from another jurisdiction for which Montana had no counterpart. Colorado prohibited at least three different driving offenses: DUI, DUI per se, and DWAI. While Montana had essentially comparable statutes for DUI and DUI per se, Montana did not have a comparable statute for DWAI. *See State v. Young*, 2012 MT 251, ¶ 16, 366 Mont. 527, 289 P.3d 110.

¶12 By contrast, Lund's convictions in Alaska resulted from a DUI statute with language nearly identical to Montana's DUI statute. Montana defines "under the influence" to mean "that as a result of taking into the body alcohol, drugs, or any combination of alcohol or drugs, a person's ability to safely operate a vehicle has been diminished." Section 61-8-401(3)(a), MCA. Given its ordinary meaning, the word "diminished" means "reduced or to a lesser degree." *State v. Polaski*, 2005 MT 13, ¶ 22, 325 Mont. 351, 106 P.3d 538 (quoting Webster's Third New International Dictionary 634 (1971)). In determining whether, "the definition of DUI under Arizona law is sufficiently similar to Alaska's definition of DUI" the Alaska Court of Appeals interpreted the "'under the influence' subsection of Alaska's DUI statute, to require proof of a level of impairment that renders the driver incapable of operating a motor vehicle with the caution characteristic

of a person of ordinary prudence who is not under the influence." *Molina v. State*, 186 P.3d 28, 29 (Alaska App. 2008) (citing *Gunderson v. Anchorage*, 762 P.2d 104, 114-15 n. 7 (Alaska App. 1988)).

¶13 In comparing these two standards, the District Court determined, "the Alaska and Montana standards are essentially the same. Both statutes require proof of more than mere drinking and driving. Both statutes require proof that the consumption of alcohol negatively impacted a person's ability to drive safely or prudently." This Court agrees. Although they employ different language, a plain reading of the standards embraced by both statutes reveals both require a reduction in "ability" or capability to operate a motor vehicle. Both statutes are similar in that they require more than just drinking and driving; they require the consumption of alcohol or drugs to affect a person's ability to drive. *Young*, ¶ 16.

¶14 We conclude that Alaska's standard of, "a level of impairment that renders the driver incapable of operating a motor vehicle with the caution characteristic of a person of ordinary prudence who is not under the influence" is not a lesser standard of impairment than required to sustain a Montana DUI conviction. Rather, Alaska's standard equates to Montana's "diminished" standard. Therefore, Alaska's and Montana's "under the influence" definitions are sufficiently similar for purposes of § 61-8-734(1)(a), MCA. As a result of a similar standard in both Alaska and Montana, Lund could have been convicted in Montana in 2003, 2007 and 2009, for the same conduct for which he was convicted in Alaska.

CONCLUSION

¶15 The District Court did not err in determining that Lund's prior convictions under Alaska's DUI statute required a similar standard of impairment to Montana's DUI statute, thus allowing them to serve as predicate offenses for enhancement purposes under Montana's felony DUI statute.

¶16 Affirmed.

/S/ LAURIE McKINNON

We concur:

/S/ JAMES JEREMIAH SHEA
/S/ JIM RICE
/S/ BETH BAKER
/S/ INGRID GUSTAFSON