DATE FILED: November 1, 2019 2:19 PM
FILING ID: F63C8AC27A1B6
CASE NUMBER: 2017CA2202

COURT OF APPEALS, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Appeal; Larimer District Court; The Honorable Stephen Howard; Case Number 2016CR2686	
Plaintiff-Appellee THE PEOPLE OF THE STATE OF COLORADO v. Defendant-Appellant MICHAEL F. MAESTAS	
Megan A. Ring Colorado State Public Defender JEANNE SEGIL 1300 Broadway, Suite 300 Denver, CO 80203 Phone: (303) 764-1400 Fax: (303) 764-1479 Email: PDApp.Service@coloradodefenders.us Atty. Reg. #50898	Case Number: 2017CA2202

REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with the applicable word limit and formatting requirements set forth in C.A.R. 28(g).

It contains 3,611 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

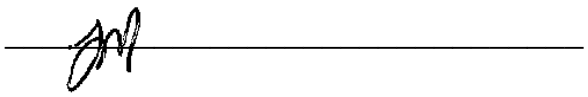

TABLE OF CONTENTS

TABLE OF CASES

TABLE OF STATUTES AND RULES

CONSTITUTIONAL AUTHORITIES

In response to matters raised in the Attorney General's Answer Brief ("AB"), and in addition to the arguments and authorities presented in the Opening Brief ("OB"), Defendant-Appellant submits the following Reply Brief.

ARGUMENT

I. The prosecution presented insufficient evidence identifying Mr. Maestas as the person previously convicted of the 1983 misdemeanor conviction, and the trial court impermissibly acted as an advocate by conducting its own research.

1. The prosecution presented insufficient evidence to prove the alleged 1983 DWAI conviction.

A defendant's constitutional right to due process requires the prosecution to prove every element of a charge beyond a reasonable doubt. U.S. Const. amends. V, XIV; Colo. Const. art. II, §§ 23, 25; *In Re Winship*, 397 U.S. 358, 364 (1970); *Griego v. People*, 19 P.3d 1, 7 (Colo. 2001). As explained in the Opening Brief and as will be further detailed, the standard of proof for prior convictions in a felony DWAI case should be beyond a reasonable doubt.[1] OB, Argument IV; *supra*, pp 12-16.

However, under either a beyond a reasonable doubt standard or a preponderance of the evidence standard, the evidence here was insufficient to prove

[1] The Colorado Supreme Court has granted the petition for writ of certiorari in *Linnebur v. People*, 18SC884, 2019 WL 3934483, to determine whether prior convictions in a felony DUI are elements and to determine the burden of proof required for prior convictions in a felony DUI prosecution.

the 1983 conviction. Before impermissibly conducting outside research, *see infra* pp 12-16, the trial court relied on the following: 1) the Colorado Crime Information Center ("CCIC") driver's query that included a 1983 DWAI conviction from Larimer County entered on October 25, 1983; and 2) a 1983 certified conviction record for a DWAI in Larimer County entered on October 25, 1983. However, the only personal information to establish identity from the 1983 conviction record was the name, Michael Frank Maestas.

In addition, the defense introduced a Colorado Bureau of Investigations ("CBI") query of Michael Frank Maestas, with a birthdate 6/26/1963, and a social security number that matched the CCIC driver's query. TR 8/17/17, pp 22-24; Def's EX A. The CBI query did not report a DUI or DWAI arrest or conviction in 1983. Id. The Department of Motor Vehicles could not find any driving records for Michael Maestas, DOB, 6/26/1963. Id., pp 25-26; Def's. EX B. Thus, the CBI query calls into question the CCIC query. The State fails to engage with the contradictory CBI report in its analysis.

Also, in *De Gesualdo v. People*, 364 P.2d 374 (Colo. 1961), testimony that the "date of conviction shown on the authenticated record from the District Court of Denver coincided with the date on his identification bureau record" did not overcome the evidentiary problem regarding identity. *Id.* at 378. Likewise, here,

even if the CCIC report was not contradicted, that still was insufficient to establish identity.

As explained in the Opening Brief, in *People v. Cooper*, 104 P.3d 307 (Colo. App. 2004), name and date of birth were insufficient evidence to establish proof of a prior conviction beyond a reasonable doubt. *Id.* at 312; OB, p 11. It follows that just a name is insufficient to establish proof by a preponderance of the evidence. If all that were required was a name to prove a prior conviction in a felony DUI case, then the level of proof would be so minimal that due process rights would become obsolete.

Moreover, even under the preponderance of the evidence standard, the trial court was "trouble[d]" by the lack of evidence of the alleged 1983 conviction, thus leading the trial court to conduct its impermissible investigation. Prior to conducting research, the court explicitly stated that it wanted more evidence and would not make a final ruling until it looked for additional information. Id., p 37:9-18. Thus, the trial court's actions indicate that the evidence as presented before the improper investigation was insufficient. *See* OB, pp 12-16.

The State also does not contest the impropriety of the court's actions, thereby conceding the issue. *See, e.g., Polk v. State*, 233 P.3d 357, 359-60 (Nev. 2010) (the State's failure to address a defendant's argument in its answer brief may be deemed

a concession); *Lee v. State*, 964 N.E.2d 859, 864-65 (Ind. Ct. App. 2012) (reversing with no harmless error analysis after noting that the State did not address reversal in its answer brief). This Court should not condone the trial court's impermissible outside investigation.

Ultimately, for the reasons explained here and in the Opening Brief, the evidence of the 1983 conviction was insufficient under a beyond a reasonable doubt standard and a preponderance of the evidence standard.

2. The 2012 conviction only counts as one prior conviction.

The State asserts that this Court can use the 2012 conviction resulting from a guilty plea to DWAI with two or more prior convictions to overcome the insufficient 1983 conviction. AB, pp 21-23. The State is wrong.

The United States and Colorado Constitutions guarantee a defendant the right to be notified of the charges against him. U.S. Const. amends. VI, XIV; Colo. Const. art. II § 16; *Cole v. Arkansas*, 333 U.S. 196, 201 (1948); *People v. Cooke*, 525 P.2d 426, 428 (Colo. 1974). And due process protects against convictions for uncharged crimes. *See* U.S. Const. amends. V, XIV; Colo. Const. art. II, § 25; *Schmuck v. United States,* 489 U.S. 705, 718 (1989); *People v. Rodriguez,* 914 P.2d 230, 257 (Colo. 1996). Indeed, the prosecution cannot constitutionally require a defendant to

answer a charge not contained in the charging document. *Schmuck,* 489 U.S. at 718; *see Casadas v. People*, 304 P.2d 626, 628 (Colo. 1956).

According to the felony DUI/DWAI statute, the prosecution must charge the three prior convictions in the indictment. § 42-4-1301(1)(j). Here, the complaint alleged three prior convictions from the following years: 2012, 1988, and 1983. Those were the sole prior convictions alleged and that the prosecution attempted to prove. The 2012 conviction only serves as one conviction. This Court does not have the power to find any prior convictions other than those alleged. Finding convictions beyond those alleged would violate Mr. Maestas's due process rights.

Furthermore, the exhibit introduced establishing the 2012 conviction does not state what convictions constituted the two or more prior convictions. Thus, the State is arguing that this Court find prior convictions without even knowing the year, case number, or any identifying information as to what constituted these two prior convictions. Mr. Maestas also did not have any opportunity to defend against these uncharged alleged prior convictions. *See People v. Weinreich*, 119 P.3d 1073, 1079 (Colo. 2005) (reversing conviction where "the information did not place [the defendant] on notice that he would have to defend against the charge actually submitted to the jury").

Ultimately, the State's argument is unconstitutional. This Court cannot go beyond the three alleged prior convictions. Because the evidence of one of those three prior convictions, the 1983 conviction, was insufficient, the felony DWAI conviction cannot stand. Mr. Maestas respectfully requests that this Court vacate his conviction for felony DWAI, enter a judgment for misdemeanor DWAI, and order resentencing for that offense. OB, pp 11-12.

II. Because the court admitted the blood test results, evidence of Mr. Maestas's initial refusal to take the test should have been excluded under CRE 403.

Because the trial court admitted the actual blood test results at trial, the evidence of Mr. Maestas's initial refusal to take the test should have been excluded under CRE 403. As the test results served as more substantive proof, the marginal probative value of the refusal evidence was low, and was substantially outweighed by the danger of unfair prejudice.

The State argues that the statute allowing admission of a driver's refusal into evidence "is the end of the inquiry." AB, p 28. However, all evidence is subject to limitations under CRE 403. As explained in the Opening Brief, it is an issue of first impression whether a refusal can be admitted under CRE 403 when the actual test results are admitted. OB, p 21.

When assessing the probative value of evidence, courts must consider the "scarcity or abundance of other evidence on the same point." *People v. Saiz,* 32 P.3d 441, 446 (Colo. 2001). Under CRE 403, "probative value" refers to the marginal or incremental probative value of evidence relative to the other evidence in the case. *Id.*; OB, pp 19-20. The State argues that the refusal evidence was not "meaningless," AB, p 31, yet that is not the test to determine admissibility under CRE 403. Given the stronger evidence of the test results, there was only minimal probative value in the introduction of refusal evidence alongside test results. *See South Dakota v. Neville*, 459 U.S. 553, 564 (1983) ("the State wants [the suspect] to choose to take the test, for the inference of intoxication arising from a blood-alcohol test is far stronger than that arising from a refusal to take the test.").

The State contends that Mr. Maestas failed to show that the evidence was "unfairly prejudicial." AB, p 31. However, as argued in the Opening Brief, the prosecution extensively relied on the facts that Mr. Maestas refused the blood test and a search warrant was required to get test results. OB, pp 22-24. *People v. Mullins,* 104 P.3d 299 (Colo. App. 2004) and its progeny are useful to explain the prejudice inherent in such statements. OB, pp 22-23. The statements communicate to the jury that a judge thought a search warrant was appropriate, thereby implying that the "defendant must be guilty." *People v. Mendenhall,* 2015 COA 107M, ¶ 62.

In addition, the refusal to take the test was treated akin to an admission of guilt. In fact, the prosecution explicitly argued that the jury should use the refusal as evidence of consciousness of guilt. TR 8/16/17, p 23:10-17; OB, pp 18-19, 24-25. Thus, the danger of unfair prejudice was exceedingly high. Because the danger of unfair prejudice substantially outweighed any minimal probative value, the trial court erred in admitting the refusal evidence.

Reversal is required under either constitutional harmless error or non-constitutional harmless error. *See* OB, pp 23-25. The State accuses Mr. Maestas of "bemoan[ing]" the extensive use of this refusal evidence. AB, p 32. However, when looking at the harm, this Court certainly should consider the extent to which the prosecution relied on this evidence. As explained in the Opening Brief, the prosecution voir dired on the refusal to take a test, the prosecution discussed it in opening statement, and argued about it extensively in closing argument and rebuttal closing argument. OB, pp 18-19. The prosecution even referred back to its voir dire in its rebuttal closing arguments, stating, "everyone said if you could take a blood test to show nothing was in your system, you would take it." TR 8/16/17, p 23:10-17. *See Domingo-Gomez v. People*, 125 P.3d 1043, 1052 (Colo. 2005) ("[r]ebuttal closing is the last thing a juror hears from counsel before deliberating, and it is therefore foremost in their thoughts.").

As explained in the Opening Brief (and not contested by the State in the Answer Brief), the evidence was far from overwhelming. OB, pp 23-24. Ultimately, for the reasons explained in the Opening Brief, this Court should reverse Mr. Maestas's conviction and remand for a new trial.

III. The ChemaTox laboratory report contained testimonial hearsay, and its admission violated Mr. Maestas's Confrontation Clause rights.

A. Standard of Review

"[I]t has long been settled that we must indulge "every reasonable presumption against waiver." *People v. Rediger*, 2018 CO 32, ¶ 46 (internal citations omitted). Waiver requires an "intentional relinquishment of a known right" and does not occur when the record does not indicate that counsel "knew of and considered the controlling law." *Id.*, ¶¶ 39, 43 (internal citations omitted). Forfeiture, rather than waiver, occurs "'when the record did not indicate that counsel knew of and considered the controlling law.'" *Id.*, ¶ 43 (internal citations omitted). "Thus, while waiver requires intent, forfeiture occurs through neglect." *Cardman v. People*, 2019 CO 73, ¶ 10 (internal citations omitted); *Phillips v. People*, 2019 CO 72, ¶ 17 (same).

Here, the claim was not waived. If the notice was insufficient to preserve this issue, then forfeiture occurred and plain error applies. *See* OB, pp 25, 31-32. The defense filed the notice of request for laboratory employees or technicians, pursuant

to section 16-3-309(5), C.R.S. CF, p 48; TR 5/17/17, pp 2-4. *Cf. People v. Tardif*, 2017 COA 136, ¶¶ 10, 29-33 (defense counsel preserved instructional issues where he tendered instructions that did not contain the defects complained of on appeal even though he did not raise the issues at the instructional conference). The court denied the defense's motion to the extent that it required all employees and technicians to testify. TR 5/17/17, pp 3-4.

Although the defense did not object at the time of the introduction of the report, that failure was not an intentional relinquishment of a known right. This case is akin to *Rediger* where the Colorado Supreme Court declined to infer waiver from defense counsel's acquiescence to an erroneous jury instruction. *Id.*, ¶ 41.

Furthermore, as in *Cardman*, "[t]he record is barren of any indication that defense counsel considered raising the unpreserved claim before the trial court but then, for strategic or any other reason, discarded the idea." *Id.*, ¶ 11; *see also Rediger*, ¶ 42 (holding that waiver did not occur because record did not contain evidence that counsel intended to relinquish client's right); *Phillips*, ¶ 22. Here, the record also does not indicate that defense counsel failed to object for any strategic reason.

The Colorado Supreme Court has reaffirmed in *Rediger*, ¶ 46; *Cardman*, ¶ 18; and *Phillips*, ¶ 16, that Colorado courts must indulge every reasonable presumption

against waiver. This Court likewise must do the same here and reach the merits of the claim.

B. The Confrontation Clause is violated when a laboratory report is introduced into evidence without testimony from the certifying scientist.

The State argues that the Confrontation Clause was not violated because the defense had the ability to cross-examine Avram and he performed the drug confirmation testing. AB, pp 43-45. First, the only claim raised here is the admission of the laboratory report. *See* OB, Argument IV. The defense does not contest that Avram could testify to the testing that he conducted. However, the report was certified and signed by Sarah Urfer and Lauren Wiles. EX 4. Because Urfer and Wiles did not testify, it was the admission of the report that violated Mr. Maestas's Confrontation Clause rights.

In *People v. Barry*, 2015 COA 4, this Court held that "[t]he Confrontation Clause is violated where a laboratory analyst who has signed a report that is admitted into evidence does not testify at trial." *Id.*, ¶ 75. The State does not engage with this holding that it was error to admit a report signed by an analyst who did not testify at trial. The State does recognize a potential Confrontation Clause problem because Urfer signed and approved the report and her signature constituted an "out-of-court testimonial statement of that fact of approval." AB, p 45. Again, this is the problem

that is contested in this claim. The violation of Mr. Maestas's Confrontation Clause rights occurred because the report contained signatures confirming the findings and those signatories did not testify. The report, signed by Urfer and Wiles, then bolstered Avram's critical testimony. OB, pp 30-31.

The State contends that *Marshall v. People*, 309 P.3d 943, 948 (Colo. 2013) allows a supervisor to testify but does not preclude a finding that others can "accomplish" the analysis. AB, pp 47-48. However, here, the report was not considered complete until it was certified and signed. Hence, that certification was the "final and necessary step." Because Avram did not certify the report, he did not "accomplish" the analysis. Thus, the admission of the report violated Mr. Maestas's statutory rights. § 16–3–309(5).

For the reasons explained in the Opening Brief, the admission of the report requires reversal. OB, pp 29-32.

IV. The trial court violated Mr. Maestas's right to a jury trial and due process rights when it imposed the wrong burden of proof and allowed the trial court to prove an element of the offense to the bench, rather than the jury.

Both Colorado statute and constitutional law dictate that prior convictions are elements of the felony DWAI statute, thereby requiring a finding by a jury of proof beyond a reasonable doubt. As explained above, the Colorado Supreme Court has

granted certiorari on this issue. *Linnebur v. People*, 18SC884, 2019 WL 3934483; *supra*, p 1.

The elemental description of the offense contains the requirement of proof of three prior convictions. OB, pp 34-36. The State's only response to this argument is that the reference to the prior convictions is in the subsequent sentence. AB, pp 51-52. However, the defining feature is the fact that the proof of the prior crime is listed in the elemental section of the offense, and not in a separate sentencing section. *See* OB, pp 34-35.

In addition, the State does not engage with Mr. Maestas's argument that the prior convictions have to be pled in the indictment. OB, p 36; *see also In re People v. Tafoya*, 2019 CO 13, ¶¶ 22–28 (emphasizing this pleading requirement in finding that Tafoya was entitled to a preliminary hearing for the crime of felony DUI). Indeed, this pleading requirement disappears when the government charges only the misdemeanor DUI/DWAI. *See* § 42-4-1307(9)(b)(II), C.R.S. ("The prosecuting attorney shall not be required to plead or prove any previous convictions at trial.").

The State contends that this Court should apply the test from *People v. Schreiber*, 226 P.3d 1221, 1223 (Colo. App. 2009), reinforced in *People v. Gwinn*, 2018 COA 130, that a prior conviction is a sentence enhancer where a defendant can

be convicted of the underlying offense without proof of the prior convictions. AB, pp 52-54.

However, the *Schreiber* test comes from double jeopardy case law and does not govern whether a defendant is entitled to a jury determination. *Schreiber* took this test from *People v. Leske*, 957 P.2d 1030 (Colo. 1998), where the Court held, "[a] statutory penalty enhancement provision, or 'penalty enhancer,' is not a substantive element of the charged offense *for purposes of double jeopardy and merger analysis*." *Id.* at 1039 (emphasis added).

In addition, *Leske* relied on an earlier double jeopardy case, *People v. Armintrout,* 864 P.2d 576 (Colo. 1993), which established that, regardless of whether something is an element or a sentence enhancer under this test, it must be proven to a jury beyond a reasonable doubt. *See id.* at 579-80 (concluding that whether defendant burgled a "dwelling" was a sentence enhancer, not an element, for double jeopardy merger analysis but observing jury still needed to find defendant burgled a dwelling beyond a reasonable doubt).

Thus, using *Schreiber*'s test to decide whether the defendant is entitled to a jury determination is misguided because the cases on which it relied do not apply in the jury trial context. In fact, *Armintrout* only reinforces the argument that the prior convictions must be proven beyond a reasonable doubt. *Id.* at 579-80. And even if

Schreiber was the test, here, finding the priors did not *raise* the felony level of his offense; it *transformed* what the jury found—misdemeanors—into felonies. *Schreiber*, 226 P.3d at 1223; *see also id.* at 1227 (Bernard, J., concurring in part and dissenting in part). Ultimately, *Schreiber* incorrectly applied law from the double jeopardy context and the *Gwinn* division erred in relying on it.

Furthermore, as explained in the Opening Brief, after *Gwinn*, our Supreme Court decided *Tafoya*. In *Tafoya*, the Court explained that prior convictions have the "quality" of elements, thereby requiring a preliminary hearing. *Id.*, ¶ 27. Although *Tafoya* should indicate that prior convictions are elements, it at the very least establishes that the statute is ambiguous. And when a criminal statute is ambiguous, this Court should apply the rule of lenity. OB, p 38; *Faulkner v. Dist. Ct.*, 826 P.2d 1277, 1278 (Colo. 1992). Additionally, habitual criminality statutes are in derogation of the common law and must be strictly construed against the right of the State to demand increased punishment. *Smalley v. People*, 304 P.2d 902, 906 (Colo. 1956); *accord Winter v. People*, 126 P.3d 192, 194 (Colo. 2006); *O'Day v. People*, 166 P.2d 789, 791 (Colo. 1946). Thus, the statute must be construed such that the prior convictions are elements that must be proven beyond a reasonable doubt.

Furthermore, to protect Mr. Maestas's due process rights and right to a trial by jury, the prior convictions needed to be proven to a jury and needed to be proven

beyond a reasonable doubt. *Alleyne v. United States*, 570 U.S. 99, 103 (2013); *In Re Winship*, 397 U.S. 358, 364 (1970); U.S. Const. amends. V, VI, XIV; Colo. Const. art. II, §§ 16, 23, 25; OB, pp 38-41.

The State does not dispute Mr. Maestas's remedy. As such, Mr. Maestas again respectfully requests that this Court remand for Mr. Maestas to be resentenced on the misdemeanor DWAI conviction that the jury's verdict authorized. *See Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993); *Medina v. People*, 163 P.3d 1136, 1141-42 (Colo. 2007). OB, pp 41-42.

CONCLUSION

For the reasons and authorities presented in Arguments I and IV here and in the Opening Brief, Mr. Maestas asks this Court to vacate his felony DWAI conviction and enter a judgment for misdemeanor DWAI. For the reasons and authorities presented in Arguments II and III here and in the Opening Brief, Mr. Maestas asks this Court to reverse his conviction and remand for a new trial.

MEGAN A. RING
Colorado State Public Defender

JEANNE SEGIL, #50898
Deputy State Public Defender
Attorneys for MICHAEL MAESTAS
1300 Broadway, Suite 300
Denver, CO 80203
(303) 764-1400

CERTIFICATE OF SERVICE

I certify that, on November 1, 2019, a copy of this Reply Brief of Defendant-Appellant was electronically served through Colorado Courts E-Filing on Marixa D. Frias of the Attorney General's office.