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CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA, APPELLEE, V.
LEOPOLDO J. GARCIA, APPELLANT.
792 N.W.2d 882

Filed January 21, 2011. No. S-10-231.

1. **Constitutional Law: Search and Seizure: Motions to Suppress: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, an appellate court applies a two-part standard of review. Regarding historical facts, an appellate court reviews the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that an appellate court reviews independently of the trial court's determination.
2. **Sentences: Prior Convictions: Appeal and Error.** A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous.
3. **Statutes: Judgments: Appeal and Error.** The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
4. **Constitutional Law: Search and Seizure.** The Fourth Amendment guarantees the right to be free of unreasonable searches and seizures.
5. **Constitutional Law: Investigative Stops: Motor Vehicles: Search and Seizure.** A vehicle stop constitutes a seizure within the meaning of the Fourth Amendment.
6. **Investigative Stops: Motor Vehicles: Probable Cause.** A traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.
7. **Police Officers and Sheriffs: Investigative Stops: Motor Vehicles: Probable Cause.** After observing suspicious and dangerous driving behavior on private property and watching the driver enter, under suspicious circumstances, onto a public road, a police officer should not have to wait to observe further dangerous driving behavior, subjecting the public to potentially serious harm, before stopping the driver to investigate.
8. **Drunk Driving: Prior Convictions: Proof: Words and Phrases.** While Neb. Rev. Stat. § 60-6,197.02(1)(a)(i)(C) (Cum. Supp. 2008) defines a prior conviction,

§ 60-6,197.02(2) defines what shall constitute the State's prima facie case proving such prior conviction.

9. **Drunk Driving: Prior Convictions: Proof: Legislature: Intent.** In providing for a simple and straightforward means of establishing the State's prima facie evidence of prior convictions, as defined by Neb. Rev. Stat. § 60-6,197.02(1)(a)(i)(C) (Cum. Supp. 2008), the Legislature implicitly acknowledged that it would be impractical, if not impossible, for the prosecution to prove particular factual predicates which may be necessary elements in Nebraska, but of no concern somewhere else.
10. **Drunk Driving: Prior Convictions: Sentences.** The fact that a defendant has previously been convicted of driving under the influence is irrelevant to guilt or innocence and is relevant only to the sentence to be meted out.
11. **Sentences: Prior Convictions: Proof.** In a sentence enhancement proceeding, it is not fundamentally unfair to consider the relative positions of the defendant and the prosecution and to place at least the burden of production on the defendant to show that a prior conviction cannot be used for enhancement.
12. **Prior Convictions: Right to Counsel: Waiver: Records: Proof: Sentences.** A transcript of a judgment which fails to contain an affirmative showing that the defendant had or waived counsel is not admissible and cannot be used to prove a prior conviction, because the State cannot meet its burden of proof with a judgment that would have been invalid to support a sentence in the first instance.
13. **Right to Counsel: Records: Presumptions: Appeal and Error.** Where a record is silent as to a defendant's opportunity for counsel, an appellate court may not presume that such rights were respected.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and John C. Jorgensen for appellant.

Jon Bruning, Attorney General, and Nathan A. Liss for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

I. NATURE OF CASE

Leopoldo J. Garcia appeals his conviction of driving under the influence (DUI), third offense, with a breath alcohol concentration of .15 or greater, in violation of Neb. Rev. Stat. § 60-6,197.03(6) (Supp. 2007). The police officer who conducted the stop had observed Garcia driving erratically in a car dealership lot after business hours and then colliding with

a pole before quickly driving onto a public highway and leaving his vehicle's bumper behind in the lot. Garcia asserts that because the observed behavior occurred on private property, the officer lacked a reasonable, articulable suspicion that he had or was about to be engaged in criminal activity. Garcia also asserts that two prior California DUI convictions were inadmissible for purposes of enhancement because California DUI laws apply anywhere in the state, while, in Nebraska, they apply only to highways and to private property open to public access.

II. BACKGROUND

1. Traffic Stop

At 12:11 a.m. on October 20, 2008, Officer Emily Noordhoek was waiting in her police cruiser at a red light when she observed someone driving a black Nissan in the parking lot of a car dealership located directly to her left. It was after business hours. Noordhoek stated that the driver's behavior was "odd." The vehicle was moving backward and forward, as if the driver were trying to get it turned around. It then ran into a wooden light pole. Noordhoek heard a loud noise, saw the vehicle's rear bumper fall to the ground, and watched the driver speed away out of the lot, leaving the bumper behind. Noordhoek was not able to observe at that time whether the light pole had been damaged.

Noordhoek decided to stop the vehicle. It passed her cruiser, heading in the opposite direction at the traffic light, and Noordhoek activated her cruiser's overhead lights and made a U-turn to follow. She testified that the vehicle was slow to stop and that she followed it approximately three or four blocks before the driver pulled over.

When Noordhoek was finally able to stop the vehicle and approach, the driver identified himself as Garcia. He presented a California identification card. He did not have a driver's license or registration papers for the vehicle. Noordhoek smelled a very strong odor of alcohol emanating from Garcia, and she observed that his eyes were watery and red and that he was slumped over as if he were about to fall asleep. When Garcia was asked to exit the vehicle, he was unable to stand

or walk without physical assistance. He was transported to "detox," where field sobriety tests were conducted. His performance indicated intoxication, and an Intoxilyzer test conducted approximately 40 minutes after the stop revealed his breath alcohol level to be .190 of 1 gram of alcohol per 210 liters of breath.

Garcia was charged with DUI, third offense, with a concentration of more than .15 of 1 gram of alcohol per 210 liters of breath. Garcia filed a motion to suppress all evidence against him on the ground that Noordhoek lacked reasonable suspicion to initiate the stop. Garcia argued that because he was not on a public roadway and because Noordhoek did not observe any damage to private property or know whether Garcia had any right to be there, there was no basis for her to believe that he had committed a crime. The trial court overruled the motion to suppress, reasoning that any officer observing Garcia's behavior in the car dealership lot could have formed a reasonable suspicion that some crime had been committed. There were "issues of trespass, possible property damage, maybe suspicion of DUI." A bench trial was held on stipulated facts, and Garcia was found guilty of DUI with a concentration of more than .15.

2. Enhancement

An enhancement hearing was held to determine whether Garcia's sentence would reflect the DUI as his third offense. Garcia objected to the admission of two prior California DUI convictions: (1) a 2004 conviction for driving with an alcohol concentration of .08 of 1 gram or more of alcohol per 210 liters of breath and (2) a 2007 conviction for driving with a concentration of .08 of 1 gram or more, enhanced by reason of having a concentration of .15 of 1 gram or more of alcohol per 210 liters of breath. Both convictions were obtained upon pleas of guilty. Garcia asserted that the State had failed to show, as required by Neb. Rev. Stat. § 60-6,197.02(1)(a)(i)(C) (Cum. Supp. 2008), that he had been convicted in California of offenses which "at the time of the conviction . . . would have been a violation of section 60-6,196." Garcia also asserted that the exhibits in support of his 2004 conviction failed to make the necessary showing that he was represented by counsel. The

trial court overruled Garcia's objections to the exhibits and found him punishable under § 60-6,197.03(6). He was sentenced to probation, with 180 days' incarceration as a term of the probation. Garcia appeals.

III. ASSIGNMENTS OF ERROR

Garcia argues that the trial court erred in (1) overruling his motion to suppress the traffic stop and all evidence obtained therefrom, (2) permitting his prior convictions under California law for purposes of enhancement under § 60-6,197.02(1)(a)(i)(C), and (3) imposing an excessive sentence.

IV. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. But whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination.[1]

[2] A sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous.[2]

[3] The meaning of a statute is a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[3]

V. ANALYSIS

1. Reasonableness of Stop

Garcia argues that the stop which eventually led to his arrest for DUI violated his Fourth Amendment rights and that the trial court erred in overruling his motion to suppress all evidence obtained from the stop. In reviewing a trial court's ruling

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[1] *State v. Scheffert*, 279 Neb. 479, 778 N.W.2d 733 (2010).

[2] *State v. Reimers*, 242 Neb. 704, 496 N.W.2d 518 (1993).

[3] *State v. Lasu*, 278 Neb. 180, 768 N.W.2d 447 (2009).

on a motion to suppress based on a claimed violation of the Fourth Amendment, we apply a two-part standard of review. Regarding historical facts, we review the trial court's findings for clear error. Whether those facts trigger or violate Fourth Amendment protections is a question of law that we review independently of the trial court's determination.[4]

[4-6] The Fourth Amendment guarantees the right to be free of unreasonable searches and seizures.[5] And a vehicle stop constitutes a seizure within the meaning of the Fourth Amendment.[6] We have said that a traffic violation, no matter how minor, creates probable cause to stop the driver of a vehicle.[7] But Garcia argues that he was on private property when Noordhoek observed the behavior that formed the basis for her decision to make the stop. He asserts that the rules of the road do not apply to private property and that thus, Noordhoek could not have observed any possible violation of traffic laws.

Contrary to Garcia's contention, many rules of the road are applicable to private property. Neb. Rev. Stat. § 60-6,108(1) (Reissue 2004) states that "sections 60-6,196, 60-6,197, 60-6,197.04, and 60-6,212 to 60-6,218 shall apply upon highways and anywhere throughout the state except private property *which is not open to public access*."[8] (Emphasis supplied.) However, because the trial court made no factual determinations concerning whether the car dealership lot was open to public access, we will assume for purposes of this appeal that Garcia did not violate any rules of the road while in the lot. This does not mean that Noordhoek was unjustified in stopping Garcia's vehicle.

[7] It is undisputed that by the time Noordhoek initiated the stop, Garcia was driving on a public road. Garcia believes it is dispositive that Noordhoek did not observe any unusual driving

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[4] *State v. Scheffert, supra* note 1.

[5] See *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996).

[6] See *State v. Draganescu*, 276 Neb. 448, 755 N.W.2d 57 (2008).

[7] *State v. Louthan*, 275 Neb. 101, 744 N.W.2d 454 (2008).

[8] See, also, *State v. Prater*, 268 Neb. 655, 686 N.W.2d 896 (2004).

behavior during the short period Garcia drove on the road before he was stopped. But that does not matter. Noordhoek observed Garcia driving in the lot. Garcia's driving behavior in the lot demonstrated his failure to control his vehicle. In particular, he appeared to be incapable of safely completing a simple driving maneuver in a relatively unobstructed space, instead, running into a light pole with enough force that his vehicle's rear bumper fell off. Garcia's "odd" and reckless driving behavior created a reasonable suspicion, if not probable cause, that Garcia was driving while impaired by drugs or alcohol.[9] Whether it was against the law to drive while impaired on the private lot, an officer observing this behavior could conclude that the driver remained thus impaired when he sped out from the lot and onto a public road. After observing suspicious and dangerous driving behavior on private property and watching the driver enter, under suspicious circumstances, onto a public road, a police officer should not have to wait to observe further dangerous driving behavior, subjecting the public to potentially serious harm, before stopping the driver to investigate.

Because Noordhoek had reasonable suspicion that Garcia was driving under the influence, the stop of Garcia's vehicle did not violate his Fourth Amendment right to be free of unreasonable search and seizure. We need not address additional nontraffic related offenses that may have also justified the stop. The evidence of Garcia's impairment derived from the stop was admissible, and his conviction for DUI over .15 is affirmed.

2. Enhancement

(a) "[W]ould have been a violation of" Neb. Rev. Stat. § 60-6,196 (Reissue 2004)

We also conclude that the trial court did not err in considering Garcia's prior California DUI convictions in sentencing him under § 60-6,197.03(6). Garcia's primary contention is that the State failed to sustain its burden to show that the

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[9] See *United States v. Sokolow*, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989).

prior convictions satisfied the requirements of § 60-6,197.02. Section 60-6,197.02(1)(a) provides that, for purposes of enhancement,

> [p]rior conviction means a conviction for a violation committed within the twelve-year period prior to the offense for which the sentence is being imposed as follows:
>
> . . . .
>
> (C) Any conviction under a law of another state if, at the time of the conviction under the law of such other state, the offense for which the person was convicted would have been a violation of section 60-6,196[.]

Garcia argues that under § 60-6,197.02(1)(a)(i)(C), in order to enhance based on a prior out-of-state DUI conviction, it is the State's burden of proof and of production to show either (1) that the laws of Nebraska and the foreign jurisdiction have the same scope of application or (2) that the peculiar facts surrounding the prior out-of-state DUI conviction would have been punishable under Nebraska law. On their face, California's DUI prohibitions apply to any kind of property,[10] while Nebraska motor vehicle laws prohibit only driving under the influence on highways or on private property that is "open to public access."[11] Thus, Garcia argues that it was the State's burden to show what kind of property was involved in his prior California DUI convictions. Since the record of the prior California convictions submitted by the State does not reflect this, he argues that his sentence must be reversed.

The State, in contrast, asserts that by presenting certified copies of the prior convictions and establishing, in accordance with our case law,[12] those convictions were counseled, it made a prima facie case for enhancement and that the burden shifted to Garcia to show why the prior offenses would not qualify under § 60-6,197.02. It relies on later subsections of § 60-6,197.02, which state:

> (2) In any case charging a violation of section 60-6,196 or 60-6,197, the prosecutor or investigating agency shall

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[10] Cal. Veh. Code §§ 23100 and 23152 (West 2000 & Cum. Supp. 2011).

[11] § 60-6,108(1).

[12] See, e.g., *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994).

> use due diligence to obtain the person's driving record from the Department of Motor Vehicles and the person's driving record from other states where he or she is known to have resided within the last twelve years. The prosecutor shall certify to the court, prior to sentencing, that such action has been taken. The prosecutor shall present as evidence for purposes of sentence enhancement a court-certified copy or an authenticated copy of a prior conviction in another state. *The court-certified or authenticated copy shall be prima facie evidence of such prior conviction.*
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> (3) For each conviction for a violation of section 60-6,196 or 60-6,197, the court shall, as part of the judgment of conviction, make a finding on the record as to the number of the convicted person's prior convictions. *The convicted person shall be given the opportunity to review the record of his or her prior convictions, bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions.*

(Emphasis supplied.)

[8] We agree that subsections (2) and (3) must be read in conjunction with subsection (1)(a)(i)(C) and that they clearly set forth the burdens of production of the respective parties as concerns whether out-of-state convictions are "prior convictions" for purposes of DUI enhancement. While § 60-6,197.02(1)(a)(i)(C) defines a "prior conviction," § 60-6,197.02(2) defines what shall constitute the State's "prima facie" case proving "such prior conviction." And § 60-6,197.02(2) simply requires a court-certified or authenticated copy of the out-of-state conviction.

It is understood that the prior conviction must be for the offense of DUI.[13] But we do not read § 60-6,197.02 as placing upon the State the initial burden of showing a substantial similarity of every element of the respective DUI laws or that the facts surrounding the prior conviction would have resulted in a violation of Nebraska DUI laws as they existed at that

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[13] See § 60-6,196.

time. Not only does subsection (2) fail to include such facts in its articulation of the State's "prima facie evidence of such prior conviction," but subsection (3) provides that after the court has made a finding of the "prior convictions," the burden falls to the defendant to "*bring mitigating facts to the attention of the court prior to sentencing, and make objections on the record regarding the validity of such prior convictions*." (Emphasis supplied.)

In *State v. Williams*,[14] the West Virginia Supreme Court of Appeals addressed enhancement based on a prior DUI conviction from another state which prohibited any "operation" of a vehicle while under the influence, including running the engine while parked. West Virginia's DUI laws extended only to "driving," which required movement of the vehicle. West Virginia's DUI statute provided for enhancement based on a prior out-of-state conviction "'of an offense which has the *same elements*'" as West Virginia's DUI statute.[15] The court concluded that, despite the fact that the term "'operate'" is a broader concept than to "'drive,'" the "mere use of the term 'operate' in [the other state's DUI] statute is insufficient to find that [the] 'same elements'" have not been met.[16]

The court reasoned that most out-of-state DUI convictions would include the factual prerequisite of vehicular movement. It would be "'improvident to indiscriminately expunge a defendant's prior DUI offenses for sentence enhancement purposes'" when the elements necessary for a conviction under the respective DUI statutes are otherwise consistent.[17] The wholesale elimination of the use of prior convictions from a state which uses the term "operate," or from any state with a similar minor

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[14] *State v. Williams*, 200 W. Va. 466, 490 S.E.2d 285 (1997), *overruled in part, State v. Hulbert*, 209 W. Va. 217, 544 S.E.2d 919 (2001).

[15] *Id*. at 469 n.3, 490 S.E.2d at 288 n.3. See, also, W. Va. Code Ann. § 17C-5-2 (LexisNexis 2009).

[16] *State v. Williams, supra* note 14, 200 W. Va. at 470, 490 S.E.2d at 289. See, also, *State ex rel. Conley v. Hill*, 199 W. Va. 686, 487 S.E.2d 344 (1997), *overruled in part, State v. Hulbert, supra* note 14.

[17] *State v. Williams, supra* note 14, 200 W. Va. at 469, 490 S.E.2d at 288, quoting *State ex rel. Conley v. Hill, supra* note 16.

variance, would also be contrary to the legislature's intent to increase the severity of sentences for recidivistic drunk driving. Therefore, insofar as it were possible that the defendant, in connection with the prior DUI, was operating but not "driving" the vehicle, the court held that the prosecution makes a prima facie case for enhanced punishment as a second offense when it presents evidence demonstrating the fact of an out-of-state DUI conviction.[18] The burden of going forward to show a factual predicate in relation to the prior offense that would not fit the "driving" element of the West Virginia statute then shifted to the defendant.[19] Absent such a showing by the defendant, the enhancement would stand.

Likewise, most out-of-state DUI convictions used for enhancement in Nebraska will involve the factual predicate, necessary under our DUI scheme, that the operation of the vehicle be on public property or on private property open to public access. The fact that another state's DUI laws apply more broadly to "all property" does not mean that it is the State's burden of production to come forward with evidence showing the exact location of the defendant's prior DUI—because of the theoretical possibility that it was committed on a kind of property to which Nebraska DUI laws would not apply. Section 60-6,197.02(2) states that, to the contrary, the State makes its prima facie case by presenting an authenticated or certified copy of the prior conviction.

[9] All states prohibit driving under the influence of alcohol or drugs.[20] But subtle variations on that general theme are as numerous as the states themselves. It was not our Legislature's intent to prohibit the consideration of prior out-of-state DUI convictions simply because differing elements of the offense or differing quantums of proof make it merely *possible* that the defendant's behavior would not have resulted in a violation of § 60-6,196, had it occurred here. In providing for a

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[18] *State v. Williams, supra* note 14. See, also, *State ex rel. Conley v. Hill, supra* note 16.

[19] See *id.*

[20] See, National Survey of State Laws 137 (Richard A. Leiter ed., 6th ed. 2008); Annot., 17 A.L.R.3d 815 (1968 & Supp. 2010).

simple and straightforward means of establishing the State's prima facie evidence of "prior convictions," as defined by § 60-6,197.02(1)(a)(i)(C), the Legislature implicitly acknowledged that it would be impractical, if not impossible, for the prosecution to prove particular factual predicates which may be necessary elements in Nebraska, but of no concern somewhere else. In this case, for instance, whether Garcia was on a public highway or on private property with "public access" is not likely to be reflected anywhere in the record of the prior California convictions, even assuming there were any obtainable records not already presented.

[10] Garcia, on the other hand, can easily attest to where he was operating his vehicle in connection with the prior California DUI convictions. Even in a criminal prosecution, we have said that "'if a negative is an essential element of the crime, and is "peculiarly within the knowledge of the defendant," it devolves upon him to produce the evidence, and upon his failure to do so, the jury may properly infer that such evidence cannot be produced.'"[21] This policy is even more apparent when the fact in question pertains not to an element of a criminal offense, but goes to punishment only.[22] The fact that the defendant has previously been convicted of DUI is irrelevant to guilt or innocence and is relevant only to the sentence to be meted out.[23]

[11] The U.S. Supreme Court has explained that it is appropriately tolerant of the wide variety of approaches and procedures which states have adopted for addressing recidivism.[24] This includes burden-shifting rules designed to simplify the prosecution's ability to make a prima facie case for purposes of enhancement.[25] The U.S. Supreme Court has said that it is not fundamentally unfair to consider the relative positions of

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[21] *State v. Minor*, 188 Neb. 23, 26, 195 N.W.2d 155, 156-57 (1972), quoting *State v. Krasne*, 103 Neb. 11, 170 N.W. 494 (1918).

[22] See *State v. Lee*, 251 Neb. 661, 558 N.W.2d 571 (1997). See, also, *Parke v. Raley*, 506 U.S. 20, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992).

[23] See *State v. Werner*, 8 Neb. App. 684, 600 N.W.2d 500 (1999).

[24] See *Parke v. Raley, supra* note 22.

[25] See *id.*

the defendant and the prosecution in this regard and to place at least the burden of production on the defendant to show that a prior conviction cannot be used for enhancement. In a case challenging a statute which presumed out-of-state prior convictions to be valid until the defendant presented evidence showing otherwise, the Court explained:

> When a defendant challenges the validity of a previous guilty plea, the government will not invariably, or perhaps even usually, have superior access to evidence. Indeed, when the plea was entered in another jurisdiction, the defendant may be the only witness who was actually present at the earlier proceeding. If raising a . . . claim and pointing to a missing record suffices to place the entire burden of proof on the government, the prosecution will not infrequently be forced to expend considerable effort and expense attempting to reconstruct records from farflung States where procedures are unfamiliar and memories unreliable. To the extent that the government fails to carry its burden due to the staleness or unavailability of evidence, of course, its legitimate interest in differentially punishing repeat offenders is compromised.[26]

Due process, the Court concluded, does not require a state to adopt one procedure over another simply on the basis that it may produce results more favorable to the accused.[27] The Court held that the statute was not unconstitutional.

The prosecution presented prima facie evidence of Garcia's prior convictions by presenting a certified copy of his California DUI convictions, which, as discussed further below, the State demonstrated were counseled. The burden thus shifted to Garcia to produce evidence rebutting the statutory presumption that those documents did not reflect that an "offense for which the person was convicted would have been a violation of section 60-6,196."[28] Despite the statutory possibility that a person convicted of DUI in California may have been operating a

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[26] *Parke v. Raley, supra* note 22, 506 U.S. at 32.

[27] See *id.*

[28] § 60-6,197.02(1)(a)(i)(C).

vehicle while intoxicated on private property not open to public access—behavior which is not a DUI offense in Nebraska—Garcia has never even argued that his California DUI convictions were for crimes that actually took place on such property. Absent a showing to the contrary, the trial court was correct to conclude, based upon the State's prima facie evidence, that there were prior convictions which could be considered in enhancing Garcia's sentence.

(b) Right to Counsel

[12,13] Garcia also contends that the State failed to show that at the time of his 2004 California DUI conviction, he either had or waived counsel. We have held that a transcript of a judgment which fails to contain an affirmative showing that the defendant had or waived counsel is not admissible and cannot be used to prove a prior conviction, because the State cannot meet its burden of proof with a judgment that would have been invalid to support a sentence in the first instance.[29] Furthermore, we have held that where a record is silent as to a defendant's opportunity for counsel, an appellate court may not presume that such rights were respected.[30] Otherwise, a sentencing court's determination concerning the constitutional validity of a prior plea-based conviction, used for enhancement of a penalty for a subsequent conviction, will be upheld on appeal unless the sentencing court's determination is clearly erroneous.[31]

The certified copies of documents relating to the 2004 conviction show that Garcia entered his plea and was sentenced during a hearing on September 17, 2004. The judge's minutes listed the constitutional rights of which Garcia was advised and stated that "defense counsel concurs in [Garcia's] plea and/or admissions." A "Case Print" reflects the same information. The "Case Print" also reflects that during a pretrial hearing, Garcia was represented by "Deputy Public Defender M. Williams." An advisement of rights, waiver, and plea form initialed and

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[29] See *State v. Ristau, supra* note 12.

[30] *Id.*

[31] *State v. Reimers, supra* note 2.

signed by Garcia also shows the "Signature of Defendant's Attorney." The signature, albeit largely illegible, attests to an "Attorney's Statement" that the form was reviewed by the attorney with Garcia and that all rights were reviewed and questions answered.

The trial court did not clearly err in concluding that the prior California convictions were counseled.

Garcia concedes that his argument concerning his sentence of 180 days' jail time was addressed in *State v. Dinslage*.[32] In *Dinslage*, we concluded that it was within the trial court's discretion to impose up to 180 days' confinement as a condition of probation. We find no error in Garcia's sentence.

VI. CONCLUSION

For the foregoing reasons, we affirm.

AFFIRMED.

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[32] *State v. Dinslage*, 280 Neb. 659, 789 N.W.2d 29 (2010).

JESUS TAPIA-REYES, APPELLEE, V.
EXCEL CORPORATION, APPELLANT.
793 N.W.2d 319

Filed January 21, 2011. No. S-10-474.

1. **Workers' Compensation: Appeal and Error.** In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the finding of the trial judge who conducted the original hearing; the findings of fact of the trial judge will not be disturbed on appeal unless clearly wrong.
2. ____: ____. With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
3. **Workers' Compensation: Evidence: Appeal and Error.** The workers' compensation review panel may reverse or modify the findings, order, award, or judgment of the original hearing only on the grounds that the judge was clearly wrong on the evidence or the decision was contrary to law.
4. **Workers' Compensation: Appeal and Error.** Appeals from a workers' compensation trial court to a review panel are controlled by the statutory provisions found in the Nebraska Workers' Compensation Act.
5. **Workers' Compensation.** The Nebraska Workers' Compensation Act is construed liberally to carry out its spirit and beneficent purposes.