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description to reflect the fence line as the property boundary. The record therefore does not support a finding of mutual mistake. In the absence of such mistake, the four corners of the written agreement must control.[24]

A court may reform a written agreement only when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct on the part of the party against whom reformation is sought.[25] Because the record does not support a finding of mutual mistake, we find that the district court erred in reforming the contract.

CONCLUSION

For the foregoing reasons, the district court erred in finding that the evidence established a mutual mistake, because there was not clear and convincing evidence that the parties had a mistaken understanding of the term at issue. As such, reformation on the basis of mutual mistake was also erroneous. Accordingly, we reverse the judgment and remand the cause with directions to the district court to enter judgment consistent with this opinion, reinstating and upholding the January 25, 1993, written agreement with respect to all parties.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

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[24] See *id.*

[25] *In re Estate of Dueck*, 274 Neb. 89, 736 N.W.2d 720 (2007).

STATE OF NEBRASKA, APPELLEE, V. ELEAZAR OCEGUERA, JR., APPELLANT.

798 N.W.2d 392

Filed June 10, 2011. No. S-10-605.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.
2. **Constitutional Law: Double Jeopardy: Sentences: Appeal and Error.** The Double Jeopardy Clause of the federal Constitution is not offended if an appellate court remands a cause for resentencing.

3. **Double Jeopardy: Sentences: Proof.** A failure of proof at an enhancement hearing is not analogous to an acquittal, and such a failure of proof does not trigger double jeopardy protections.
4. **Prior Convictions: Drunk Driving: Habitual Criminals: Sentences: Evidence.** The use of prior convictions to enhance a sentence for driving under the influence is similar to the use of prior convictions to enhance a sentence under our habitual criminal scheme, in which evidence of prior convictions must be introduced.

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Sentence vacated, and cause remanded with directions.

Timothy J. Wollmer, of Egr & Birkel, P.C., for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein for appellee.

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

HEAVICAN, C.J.

INTRODUCTION

Eleazar Oceguera, Jr., appeals his convictions and sentences from the Colfax County District Court. Oceguera pled guilty to driving under the influence (DUI), charged as a fourth offense, a Class III felony, as well as operating a motor vehicle to avoid arrest, a Class IV felony. Oceguera alleges that the State presented evidence of only two valid prior DUI convictions at his enhancement and sentencing hearing. Oceguera asks that we vacate his sentence and remand the cause for sentencing on DUI, third offense. The State agrees that only two valid prior offenses were proved, but requests that we remand for a new enhancement hearing. We agree that the State failed to present sufficient evidence of three valid prior convictions for DUI, and we remand the cause with directions for a new enhancement and sentencing hearing.

BACKGROUND

On January 1, 2010, an officer of the Colfax County Sheriff's Department witnessed Oceguera driving on U.S. Highway 30 in Colfax County, Nebraska. Oceguera's vehicle traveled onto the shoulder of the road twice, then crossed the divided white line.

Oceguera refused to stop when the officer attempted to pull him over. Oceguera finally stopped his vehicle and fled on foot, at which point a second officer of the Colfax County Sheriff's Department arrived. The officers apprehended Oceguera shortly thereafter. Oceguera resisted arrest by trying to physically fight off the officers.

Once Oceguera was apprehended, one of the officers detected the odor of alcoholic beverages on Oceguera's breath and observed that Oceguera's eyes were bloodshot. The officer asked Oceguera to perform field sobriety test maneuvers, which showed impairment, and a preliminary breath test showed a result of .159. Oceguera refused a blood test and was taken into custody.

Oceguera was originally charged with one count of DUI, fifth offense, and with seven other offenses. But pursuant to a plea bargain, on February 10, 2010, Oceguera was charged with DUI, fourth offense, and operating a motor vehicle to avoid arrest. The district court found that Oceguera entered his pleas knowingly and voluntarily and found him guilty of both charges. Oceguera was given a 90-day evaluation prior to sentencing.

At the sentencing and enhancement hearing on May 26, 2010, the State offered three certified copies of prior convictions. The district court found that those three exhibits were valid prior convictions of DUI. In fact, the first exhibit was a certified prior conviction for "Operating [a] Motor Vehicle During 15 Year Revocation." Oceguera did not object to the use of that exhibit to enhance his sentence.

The district court sentenced Oceguera to 7 to 15 years' imprisonment for DUI, fourth offense, and 20 to 60 months' imprisonment for operating a motor vehicle to avoid arrest, with the sentences to be served concurrently. The court also ordered Oceguera's driver's license to be revoked for a period of 15 years, with the period of revocation to run concurrently with his sentence for DUI.

Oceguera appealed to the Nebraska Court of Appeals. Because he did not object to the use of the State's first exhibit before the district court, Oceguera was limited to arguing that the district court had committed plain error by using a

prior conviction for driving under revocation to enhance his sentence. The State agreed that the district court had erred, and it filed a motion for remand, which the Court of Appeals denied. The Court of Appeals then asked the State to address in its brief the application of *State v. Hense*[1] and *State v. Head*[2] to the present case. We subsequently moved the case to our docket.

ASSIGNMENTS OF ERROR

Oceguera assigns that the district court erred by (1) enhancing his DUI sentence to that of a fourth offense absent proof of three prior DUI convictions, (2) failing to sentence him to a term of probation, and (3) imposing an excessive sentence. Oceguera also argues that his trial counsel was ineffective for failing to exercise reasonable due diligence, which failure resulted in an improper plea bargain, plea, and enhancement.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision of the court below.[3]

ANALYSIS

The primary issue in this case is whether we should remand Oceguera's cause for sentencing on DUI, third offense, or whether we should remand for a new enhancement hearing. Because insufficient evidence existed to enhance Oceguera's conviction to a fourth offense, the State urges us to remand for another enhancement hearing in order to allow the State to present sufficient evidence of the third prior conviction. Oceguera argues that we should remand for sentencing for DUI, third offense.

As noted, the Court of Appeals asked the State to address the application of *Hense* and *Head* to the present case. Both

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[1] *State v. Hense*, 276 Neb. 313, 753 N.W.2d 832 (2008).

[2] *State v. Head*, 276 Neb. 354, 754 N.W.2d 612 (2008).

[3] *Head, supra* note 2.

cases involved an appeal taken by a prosecuting attorney under Neb. Rev. Stat. §§ 29-2315.01 and 29-2316 (Reissue 2008). Section 29-2315.01 provides in part:

> The prosecuting attorney may take exception to any ruling or decision of the court made during the prosecution of a cause by presenting to the trial court the application for leave to docket an appeal with reference to the rulings or decisions of which complaint is made. Such application shall contain a copy of the ruling or decision complained of, the basis and reasons for objection thereto, and a statement by the prosecuting attorney as to the part of the record he or she proposes to present to the appellate court.

Section 29-2316 states in part:

> The judgment of the court in any action taken pursuant to section 29-2315.01 shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy, but in such cases the decision of the appellate court shall determine the law to govern in any similar case which may be pending at the time the decision is rendered or which may thereafter arise in the state.

In *Hense*, the defendant pled guilty to the felony charge of operating a motor vehicle while his license was revoked. The district court sentenced the defendant to 2 years' probation but did not order a further revocation of his license as part of the sentence. The State appealed, arguing that a 15-year revocation was mandatory under Neb. Rev. Stat. § 60-6,197.06 (Cum. Supp. 2008). We found that the further revocation was mandatory, but because of the limitations set forth in §§ 29-2315.01 and 29-2316, we determined that jeopardy had attached and the defendant could not be resentenced.[4]

In *Head*, the defendant pled guilty to DUI and the State produced evidence of four prior convictions. The district court rejected one of the prior convictions based on the defendant's argument that it was invalid. The State appealed. We held

[4] *Hense, supra* note 1.

that the defendant's argument was an impermissible collateral attack and that the prior conviction was valid for enhancement purposes. But we also found that § 29-2316 precluded a remand.[5]

The State argues that *Hense* and *Head* are inapplicable here because those two cases involved the State's taking exception to a judgment of conviction and sentence. We agree. Our analysis of *Hense* and *Head* rested in large part on our interpretation of §§ 29-2315.01 and 29-2316. Specifically, we found that in an appeal taken pursuant to § 29-2315.01, "'[t]he judgment of the court . . . shall not be reversed nor in any manner affected when the defendant in the trial court has been placed legally in jeopardy.'"[6] We went on to note that our interpretation of the language "placed legally in jeopardy" in § 29-2316 is more stringent than the Double Jeopardy Clause of the federal constitution, but we also stated that the analysis under § 29-2316 was not a double jeopardy analysis.[7]

[2,3] Even if Oceguera had raised a double jeopardy argument, which he did not, he would be unable to prevail. We recognized in *Head* that the Double Jeopardy Clause of the federal Constitution "is not offended if an appellate court remands a cause for resentencing."[8] The U.S. Supreme Court has said that a failure of proof at an enhancement hearing is not analogous to an acquittal and that such a failure of proof does not trigger double jeopardy protections.[9] Therefore, neither our prior case law, specifically *Hense* and *Head*, nor any federal constitutional law prohibits a new enhancement hearing.

Having concluded that double jeopardy concerns are not implicated here, we agree with the State that this case is more analogous to those habitual criminal cases where we have remanded for a new enhancement hearing. The State

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[5] *Head, supra* note 2.

[6] *Id.* at 357, 754 N.W.2d at 614.

[7] *Id.* See, also, *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

[8] *Head, supra* note 2, 276 Neb. at 357, 754 N.W.2d at 614.

[9] *Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615 (1998).

cites *State v. King* (*King III*),[10] the last in a series of appeals wherein the defendant's cause was repeatedly remanded for enhancement under the habitual criminal provision. The State also points to an unpublished case, *State v. Rose*,[11] involving three attempts at enhancing the defendant's sentence as a habitual criminal.

In *State v. King* (*King I*),[12] the State attempted to enhance the defendant's sentence under Neb. Rev. Stat. § 29-2221(2) (Reissue 1995). Section 29-2221(2) (Reissue 2008) requires that after a defendant is convicted of a felony, a prosecuting attorney seeking the habitual criminal enhancement must submit evidence of two or more prior felony convictions. The court is required to give notice to the defendant at least 3 days in advance of the enhancement hearing. If the court finds sufficient evidence of two prior convictions, the defendant is sentenced as a habitual criminal.

In *King I*, we found the State had not met its burden to show that the defendant had been convicted of two prior felonies and that he had been represented by counsel at all critical stages for those prior convictions. In *State v. King* (*King II*),[13] the State conceded that it had not presented sufficient evidence that the defendant had been represented by counsel during all stages of one prior conviction, and it asked this court to remand the cause for a new enhancement hearing. And, in *King III*, the district court had determined that the State failed to provide sufficient evidence of two prior convictions.[14] Unlike the circumstances of *Hense* and *Head*, wherein we determined that a change in sentence is prohibited under § 29-2316,[15] no such prohibition exists where a defendant appeals from an alleged deficiency in the prior convictions used for enhancement.

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[10] *State v. King*, 275 Neb. 899, 750 N.W.2d 674 (2008).

[11] *State v. Rose*, No. A-05-707, 2006 Neb. App. LEXIS 175 (Neb. App. Oct. 3, 2006) (not designated for permanent publication).

[12] *State v. King*, 269 Neb. 326, 693 N.W.2d 250 (2005).

[13] *State v. King*, 272 Neb. 638, 724 N.W.2d 80 (2006).

[14] *King III, supra* note 10.

[15] *Hense, supra* note 1; *Head, supra* note 2.

We note that the procedure used for a habitual criminal enhancement hearing is similar to the procedure for enhancement of a DUI sentence. Under Neb. Rev. Stat. § 60-6,197.02(2) (Reissue 2010), the prosecutor is required to present court-certified or authenticated copies of the defendant's prior convictions for DUI. The prior convictions are to be produced before sentencing, and the defendant is to 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.

[4] We conclude that the use of prior convictions to enhance a sentence for DUI is similar to the use of prior convictions to enhance a sentence under our habitual criminal scheme, in which evidence of prior convictions must be introduced.[16] We have not hesitated to remand for a new enhancement hearing when the State has failed to produce sufficient evidence of the requisite prior convictions for habitual criminal purposes. The same procedure should be utilized here, because we are not bound by the restrictions of § 29-2315.01 or § 29-2316 in this case as we were in *Hense* and *Head*. Therefore, we vacate Oceguera's sentence for DUI, fourth offense, and remand the cause with directions for another enhancement hearing. Because we are remanding the cause, we need not reach the remainder of Oceguera's assignments of error.

CONCLUSION

We find that the district court erred when it used a prior conviction for driving under revocation to enhance Oceguera's sentence for DUI. But because the limitations of §§ 29-2315.01 and 29-2316, which were applicable in *Hense* and *Head*, are inapplicable here, we remand the cause with directions for another enhancement hearing.

SENTENCE VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

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[16] See *State v. Hall*, 268 Neb. 91, 679 N.W.2d 760 (2004).