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STATE OF NEBRASKA, APPELLEE, V. TRAVIS T. MITCHELL, APPELLANT.

820 N.W.2d 75

Filed May 1, 2012. No. A-11-407.

1. **Judgments: Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court.
2. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.
3. **Drunk Driving: Prior Convictions: Proof: Legislature: Intent.** It was not the Legislature's intent to prohibit the consideration of prior out-of-state driving under the influence convictions simply because differing elements of the offense or differing quantums of proof made it merely possible that the defendant's behavior would not have resulted in a violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2010) had it occurred here.
4. ____: ____: ____: ____: ____. The Legislature implicitly acknowledged that it would be impractical, if not impossible, to prove particular factual predicates which may be necessary elements in Nebraska, and this was why it provided 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) (Reissue 2010).
5. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
6. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
7. **Sentences: Probation and Parole: Appeal and Error.** Whether probation or incarceration is ordered is likewise a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

INBODY, Chief Judge, and MOORE and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Travis T. Mitchell appeals from an order of the district court for Lancaster County enhancing Mitchell's conviction for driving under the influence (DUI). Mitchell alleges that his prior conviction in Colorado for driving while ability impaired (DWAI) should not be used to enhance the penalty in this case. He also alleges the sentence imposed by the district court was excessive. Based on the reasons that follow, we affirm.

BACKGROUND

On August 4, 2010, an information was filed in the district court for Lancaster County charging Mitchell with the following: count 1, DUI, fourth offense, a Class IIIA felony in violation of Neb. Rev. Stat. §§ 60-6,196 (Reissue 2010) and 60-6,197.03(7) (Supp. 2009); count 2, no valid registration, a Class III misdemeanor in violation of Neb. Rev. Stat. § 60-362 (Reissue 2010); and count 3, no proof of insurance, a Class II misdemeanor in violation of Neb. Rev. Stat. § 60-3,167 (Reissue 2010). On August 11, Mitchell was arraigned on the information and pled not guilty to all counts. Mitchell was tried in front of a jury on January 3 and 4, 2011. Mitchell was found guilty of count 1 and not guilty of counts 2 and 3, and the district court accepted the jury verdicts.

An enhancement hearing was held on April 18, 2011. At the hearing, the State offered three exhibits as evidence of prior convictions. One of those exhibits involved a Colorado conviction, which exhibit Mitchell objected to on the ground of relevance. He stated the Colorado conviction was not an offense which would have been a violation of § 60-6,196. The trial court took the matter under advisement. On April 27, the court issued an order finding that Mitchell had three prior convictions for enhancement purposes under Neb. Rev. Stat. § 60-6,197.02(1)(a)(i)(C) (Reissue 2010). The court found the

State had met its burden to establish a prima facie case that "the conviction under Colorado's DWAI law could also be a conviction under Nebraska's DUI law." Having found the State met its burden, the burden then shifted to Mitchell to establish that the Colorado DWAI conviction would not be a violation of Nebraska's DUI law. The court concluded that Mitchell did not meet his burden.

On May 3, 2011, Mitchell was sentenced to imprisonment under the jurisdiction of the Nebraska Department of Correctional Services for 3 to 5 years for the DUI conviction. Credit was given for 43 days that Mitchell previously served. Mitchell's driving privileges were revoked for 15 years. Mitchell timely appeals.

ASSIGNMENTS OF ERROR

Mitchell alleges the district court erred in finding that Mitchell's prior Colorado conviction for DWAI could be used to enhance the penalty for DUI. He also alleges the sentence imposed by the district court was excessive and constituted an abuse of discretion.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the trial court. *State v. Macek*, 278 Neb. 967, 774 N.W.2d 749 (2009).

[2] A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Moore*, 277 Neb. 111, 759 N.W.2d 698 (2009).

ANALYSIS

Enhancement.

Mitchell alleges the district court erred in finding that his prior conviction in Colorado for DWAI could be used to enhance the penalty for DUI. Mitchell argues that the State did not meet the burden of producing prima facie evidence of a prior conviction because that prior conviction must be for the offense of DUI. However, that is not what the Nebraska statute requires.

In Nebraska, a prior conviction means a conviction for a violation committed within the 12-year period prior to the offense for which the sentence is being imposed. § 60-6,197.02(1)(a). For violation of § 60-6,196, a conviction can be any conviction under the 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 § 60-6,196. See § 60-6,197.02(1)(a)(i)(C).

In Nebraska, there are two methods of proving DUI: The State may prove either that the defendant had a blood alcohol content of .08 or more, described as "a concentration of eight-hundredths of one gram or more by weight of alcohol per one hundred milliliters" of his or her blood, or that the defendant was under the influence of alcohol or drugs at the time he or she was operating or in control of a vehicle on public property or private property open to public access. § 60-6,196. The phrase "under the influence of alcoholic liquor or of any drug" means the ingestion of a substance in an amount sufficient to impair to any appreciable degree the driver's ability to operate a motor vehicle in a prudent and cautious manner. *State v. Batts*, 233 Neb. 776, 448 N.W.2d 136 (1989).

In Colorado, there are two offenses for degrees of impairment while driving. One is DUI, the other is DWAI. Like Nebraska, the Colorado statutes provide two methods of proving DUI: The State may prove either that the defendant had a blood alcohol content of .08 or more or that the defendant consumed alcohol and/or drugs in such amount that the person is "substantially incapable" of exercising "clear judgment, sufficient physical control, or due care in the safe operation of a vehicle." Colo. Rev. Stat. Ann. § 42-4-1301(1)(f) (West Supp. 2011). DWAI is proved by a blood alcohol content "in excess of 0.05, but less than 0.08," § 42-4-1301(6)(a)(II), or a showing that drugs or alcohol affected the person to the "slightest degree," § 42-4-1301(1)(g).

In the Colorado case, Mitchell was originally charged with DUI, but entered a plea to DWAI. Though Mitchell was convicted of DWAI, not DUI, in Colorado, the offense could still be considered a violation of § 60-6,196 if it meets the statutory requirements. A conviction using the blood alcohol content

method of proof for DWAI in Colorado would not meet the requirements of the Nebraska statute. A defendant's blood alcohol content between the upper and lower limits for DWAI would not meet or exceed the .08 threshold for a violation of § 60-6,196. The record in this case does not contain Mitchell's blood alcohol content results, because he filed a successful motion to suppress.

[3,4] Next, we consider whether the second method of proof for DWAI could qualify as a violation of § 60-6,196. In *State v. Garcia*, 281 Neb. 1, 11, 792 N.W.2d 882, 890 (2011), the Supreme Court stated 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." The Supreme Court stated the Legislature "implicitly acknowledged that it would be impractical, if not impossible," to prove particular factual predicates which may be necessary elements in Nebraska, and this was why it provided a 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). *Garcia*, 281 Neb. at 12, 792 N.W.2d at 890.

In *State v. Garcia, supra*, the Supreme Court discussed a prior conviction in California, where a person may be convicted of DUI on either public or private property. The defendant argued the State failed to carry its burden of proof because it had not established the offense had occurred on public property. The Supreme Court held the State did not bear the burden of establishing that every element was met. Rather, the State must show that the elements of the offense, had it occurred in Nebraska, would have resulted in a violation of Nebraska's DUI laws. The court held that if the State demonstrates this, the burden shifts to the defendant to show the facts establishing the offense occurred on private property in California and thus would not have proved a DUI in Nebraska. Essentially, once the State shows that the offense *could* have been a DUI, the defendant then has the burden to bring mitigating factors to the attention of the court.

The Colorado DWAI statute sets a lower threshold limit of proving the person was affected by alcohol to the "slightest degree." As the district court order stated, a defendant could be more than slightly affected by alcohol or drugs and still be convicted of DWAI in Colorado, and if that impairment rose to the level of appreciable degree, the defendant could be convicted under Nebraska's DUI law.

The State presented its prima facie case showing Mitchell's two prior convictions in Nebraska and one prior conviction in Colorado which could have been a violation of § 60-6,196 had the incident occurred in Nebraska. At that point, the burden shifted to Mitchell to establish that the facts supporting the Colorado DWAI would not support a conviction under Nebraska's DUI law, and he failed to do that.

The exhibit regarding the Colorado conviction indicates Mitchell was more than slightly affected by alcohol. This could be viewed as further proof establishing he was affected to an appreciable degree. The record indicates that Mitchell's vehicle drifted and jerked on the road and that when Mitchell was pulled over, the trooper noticed his eyes were bloodshot and glassy. The trooper also reported that he smelled an odor of alcohol coming from Mitchell and the vehicle and that he observed a bottle of alcohol at Mitchell's feet. Mitchell's speech was slurred, and he was unable to satisfactorily perform field sobriety tests. The facts indicate he could have been affected to more than the slightest degree or to the level of appreciable impairment.

We find that the district court correctly determined Mitchell's prior conviction in Colorado could have been a violation of § 60-6,196 and that the prior conviction was correctly used for enhancement of the sentence in the instant case. Mitchell has two additional prior convictions in Nebraska for DUI. These convictions are undisputed for purposes of enhancement.

Excessive Sentence.

Mitchell alleges the sentence imposed by the district court was excessive and constituted an abuse of discretion. He asserts he was deprived of a just result by being sentenced to imprisonment for 3 to 5 years when a lesser sentence would have

served any and all purposes of sentencing within the criminal justice system.

[5] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Kuehn*, 273 Neb. 219, 728 N.W.2d 589 (2007).

[6] An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *State v. Riley*, 281 Neb. 394, 796 N.W.2d 371 (2011).

[7] Whether probation or incarceration is ordered is likewise a choice within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion. *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

The district court concluded that Mitchell had committed three prior offenses for enhancement purposes, and we agree. This means the current case is a result of his fourth offense in a 12-year period in violation of § 60-6,196. Under the statutes, this is a Class IIIA felony and is punishable by up to 5 years' imprisonment. See § 60-6,197.03(7) and Neb. Rev. Stat. § 28-105(1) (Reissue 2008). Section 60-6,197.03(4) also states that the court "shall, as part of the judgment of conviction, order that the operator's license of such person be revoked for a period of fifteen years from the date ordered by the court." The district court's order is within statutory limits, so we must consider whether an abuse of discretion exists.

Mitchell asserts the court abused its discretion by disregarding "several mitigating factors," brief for appellant at 18, including the motivations behind Mitchell's actions, his mental health history, and his exposure to alcohol and drugs at a young age. Mitchell cites the presentence investigation report as evidence of this history. Mitchell also states the current offense was likely "just an unfortunate slip up." Brief for appellant

at 20. Mitchell requested probation, but he failed to appear for his probation appointment.

The record indicates the court considered the presentence investigation report, the comments made at the hearing, and the applicable statutes. Further, the court's order states the court regarded "the nature and circumstances of the crimes and the history, character and condition" of Mitchell. The court ultimately determined "imprisonment of [Mitchell] is necessary for the protection of the public because the risk is substantial that, during any period of probation, [Mitchell] would engage in additional criminal conduct and because a lesser sentence would depreciate the seriousness of [Mitchell's] crimes and promote disrespect for the law."

Mitchell has committed four qualifying offenses under Nebraska's DUI statutes in the past 12 years, in addition to other criminal offenses. He was placed on probation for terroristic threats, and his probation was revoked. Though he requested probation in this case, he acknowledged at the enhancement hearing that he did not appear for his probation appointment. In addition to these facts, the court cited valid public safety concerns supporting imprisonment due to Mitchell's continued criminal behavior. Given the circumstances, we find the sentence of imprisonment, which was within the statutory limits, was not untenable or unreasonable. We find there was no abuse of discretion.

CONCLUSION

We find Mitchell's conviction for DWAI in Colorado is a qualifying "prior conviction" under the Nebraska statutes; thus, Mitchell had three prior convictions for enhancement purposes. We also find Mitchell's sentence was within statutory limits and was not an abuse of discretion under the circumstances.

AFFIRMED.