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Neb. Ct. R. §§ 3-310(P) and 3-323(B) of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

STATE OF NEBRASKA, APPELLEE, V.
TRAVIS T. MITCHELL, APPELLANT.
825 N.W.2d 429

Filed January 25, 2013. No. S-11-407.

1. **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.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and MOORE and PIRTLE, Judges, on appeal thereto from the District Court for Lancaster County, STEVEN D. BURNS, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

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

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

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

WRIGHT, J.

NATURE OF CASE

Travis T. Mitchell was charged with driving under the influence (DUI), fourth offense; no valid registration; and no proof of insurance. A jury found him guilty of DUI but acquitted him of the other two charges. The Lancaster County District Court determined that a conviction for driving while ability impaired (DWAI) in Colorado could be used to enhance Mitchell's

current DUI offense. He was sentenced to 3 to 5 years' imprisonment, and his license was revoked for 15 years.

Mitchell appealed to the Nebraska Court of Appeals, alleging his DWAI conviction could not be used to enhance the penalty in this case. The Court of Appeals affirmed the judgment of the district court in *State v. Mitchell*, 19 Neb. App. 801, 820 N.W.2d 75 (2012). We granted Mitchell's petition for further review.

SCOPE OF REVIEW

[1] 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. *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011).

FACTS

On May 2, 2010, Mitchell was involved in a traffic accident near 70th and Dudley Streets in Lincoln, Nebraska. Sgt. Grant Richards of the Lincoln Police Department testified that he was traveling north on 70th Street and observed a vehicle on the west side of the street that was suspended on the guide wire that supported a utility pole. Richards observed Mitchell jump out of the driver's door of the vehicle. While talking with Mitchell, Richards smelled the odor of alcohol on Mitchell's breath. Richards suspected that Mitchell was under the influence of alcohol. Richards turned Mitchell over to the investigating police officer who had arrived at the scene a few minutes after Richards.

The police officer administered a horizontal gaze nystagmus test and a preliminary breath test. Mitchell was arrested and transported to the detoxification center, where his blood alcohol content was determined to be .103 grams of alcohol per 210 liters of breath.

On August 4, 2010, an information was filed in Lancaster County District Court charging Mitchell with 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).

He was also charged with having no valid registration or proof of insurance. Mitchell was convicted of DUI but was acquitted of the other charges.

An enhancement hearing was held on April 18, 2011. At the hearing, the State offered three exhibits as evidence of prior convictions. One of the exhibits involved a Colorado conviction. Mitchell objected to this exhibit, and the district court continued the hearing. 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 that the State had met its burden to establish a prima facie case that "conviction under Colorado's DWAI law could also be a conviction under Nebraska's DUI law."

In addition to its DWAI statute, Colorado also has a DUI statute. See Colo. Rev. Stat. Ann. § 42-4-1301(1)(f) and (g) (West 2012). In Colorado, the distinction between DWAI and DUI is that DWAI requires that "a person has consumed alcohol . . . that affects the person to the slightest degree so that the person is less able than the person ordinarily would have been . . . to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle." § 42-4-1301(1)(g). DUI requires that "the person is substantially incapable . . . to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle." § 42-4-1301(1)(f).

Under Colorado's statutory scheme, blood alcohol content raises various permissible inferences. A blood alcohol content between .05 and .08 raises a permissible inference of DWAI. § 42-4-1301(6)(a)(II). A blood alcohol content of .08 or above raises a permissible inference of DUI. § 42-4-1301(6)(a)(III). Under Nebraska's statutory scheme, the requirements for DUI can be met in two different ways. Driving with a blood alcohol content of .08 or above results in a DUI regardless of the driver's level of impairment. § 60-6,196(1)(b) and (c). A defendant also commits DUI in Nebraska by driving "[w]hile under the influence of alcoholic liquor . . . ," § 60-6,196(1)(a), which requires impairment to an appreciable degree. See *State v. Batts*, 233 Neb. 776, 448 N.W.2d 136 (1989).

In the case at bar, the district court considered the offense of DWAI in Colorado to determine if it could establish a DUI in Nebraska. The court reasoned that because there was an upper blood alcohol limit of .08 for the offense of DWAI, a conviction for DWAI based on blood alcohol content would not be a DUI conviction in Nebraska. However, because DWAI may also be proved by evidence that the person was affected by alcohol to the slightest degree and there is no upper limit on the degree to which a person may be affected, the court concluded that a defendant could be more than slightly affected by alcohol and still be convicted of DWAI in Colorado. It reasoned that if the defendant was affected to an appreciable degree, the defendant could be convicted of DUI in Nebraska.

The district court determined that the exhibit regarding Mitchell's conviction in Colorado indicated he was more than slightly affected by alcohol. (His vehicle drifted and jerked on the road, his eyes were bloodshot, his speech was slurred, and he was unable to satisfactorily perform field sobriety tests.) The court concluded the record could be viewed as establishing that Mitchell was affected to an appreciable degree. Therefore, the State had established a prima facie case that the conviction under Colorado's DWAI law could also be a conviction under Nebraska's DUI law.

On appeal, Mitchell claimed that the district court erred in finding that his prior Colorado conviction for DWAI could be used to enhance the penalty for DUI. The Court of Appeals agreed with the district court's analysis that a conviction for DWAI based on blood alcohol content would not satisfy the requirements of a Nebraska DUI. We point out that the record did not contain Mitchell's blood alcohol content related to the DWAI conviction because he had successfully suppressed that evidence.

The Court of Appeals next considered whether a showing that a defendant was affected to more than the "'slightest degree'" could qualify as a DUI in Nebraska. *State v. Mitchell*, 19 Neb. App. 801, 806, 820 N.W.2d 75, 80 (2012). It found that a defendant could be more than "slightly affected" by alcohol and be convicted of DWAI in Colorado and that if the impairment rose to an "appreciable degree," the defendant

could be convicted under Nebraska's DUI law. *Id*. "The facts indicate [Mitchell] could have been affected to more than the slightest degree or to the level of appreciable impairment." *Id*. It concluded that the State presented a prima facie case by showing the prior DWAI conviction in Colorado could have been a violation of § 60-6,196 had the incident occurred in Nebraska. The burden then shifted to Mitchell to establish that the facts supporting the Colorado DWAI would not support a conviction under Nebraska's DUI statute.

Mitchell had two prior DUI convictions in Nebraska that were undisputed for purposes of enhancement. The Court of Appeals found that Mitchell's conviction for DWAI in Colorado qualified as a prior conviction under Nebraska statutes and that, therefore, Mitchell had three prior convictions for enhancement purposes. It affirmed the judgment of the district court.

ASSIGNMENT OF ERROR

Mitchell assigns, restated, that the Court of Appeals erred in concluding that his Colorado DWAI conviction could be used to enhance the penalty for DUI.

ANALYSIS

At the time of Mitchell's enhancement hearing, a conviction under a law of another state for a violation committed within a 12-year period prior to the offense for which the sentence was being imposed could be used to enhance the penalty for DUI 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). The issue presented is whether Mitchell's conviction for DWAI in Colorado can be used to enhance his conviction to fourth-offense DUI in Nebraska. 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. *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011).

In his argument against enhancement, Mitchell relies upon *Garcia*, in which an officer stopped Leopoldo J. Garcia after observing him driving erratically in a car dealership parking lot after business hours and then colliding with a light pole. Garcia was convicted of DUI following a bench trial on stipulated facts.

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. He claimed that the State had not shown the prior convictions would have been violations of § 60-6,196. California DUI laws applied anywhere in the state, while in Nebraska, they applied only to highways and private property open to public access. The trial court admitted the California convictions. Garcia was convicted of DUI (third offense), and he appealed.

On appeal, Garcia argued that the State was required to establish that his convictions in California occurred on public property. The record of the California convictions did not reflect that particular fact.

The State claimed that by presenting certified copies of the prior convictions and establishing that those convictions were counseled, it made a prima facie case for enhancement and that the burden then shifted to Garcia to show why the prior offenses would not qualify as a prior offense under Nebraska law. We stated that under § 60-6,197.02, "[i]t is understood that the prior conviction must be for the offense of DUI. 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 . . . ." *Garcia*, 281 Neb. at 9, 792 N.W.2d at 889. We held that the prosecution had presented prima facie evidence of Garcia's prior conviction by presenting a certified copy of his California DUI convictions, which the State demonstrated were counseled. The burden then 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 [§] 60-6,196.'" *Garcia*, 281 Neb. at 13, 792 N.W.2d at 892.

We expressly pointed out in *Garcia* that in order to use the out-of-state conviction for enhancement, the prior conviction must be for the offense of DUI. We did 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." *Garcia*, 281 Neb. at 9, 792 N.W.2d at 889. When the prosecution presented evidence of Garcia's prior counseled convictions, the burden then shifted to Garcia.

Mitchell argues that the State has never satisfied its burden to provide prima facie evidence of a prior conviction in Colorado because "[i]t is understood that the prior conviction must be for the offense of DUI." See *id*. We agree.

Both the district court and the Court of Appeals recognized that Nebraska's "any appreciable degree" requirement for DUI was higher than Colorado's "slightest degree" requirement for DWAI. See *State v. Mitchell*, 19 Neb. App. 801, 820 N.W.2d 75 (2012). However, because an individual impaired to an appreciable degree was also impaired to the slightest degree, both courts concluded that it was possible for a person to receive a DUI in Nebraska for acts that constituted a DWAI in Colorado. In their analysis, both courts looked at the facts incident to Mitchell's arrest and conviction in Colorado.

This analysis is incorrect. Mitchell pled guilty to the charge of DWAI. The theoretical possibility that a defendant's conviction for DWAI could have satisfied the Nebraska elements for DUI is not enough. The prior out-of-state conviction must be for the offense of DUI. *State v. Garcia*, 281 Neb. 1, 792 N.W.2d 882 (2011).

Mitchell's conviction of DWAI was a determination that his conduct met the minimum requirement for violation of the DWAI statute. His conviction meant that he was impaired to the slightest degree. The conviction made no other determination of Mitchell's impairment. To enhance Mitchell's penalty for DUI because the facts of his arrest and conviction in Colorado *could* support the higher requirement for a Nebraska DUI is to enhance Mitchell's penalty based on a crime for which he was never convicted. Hence, it is the conviction for DWAI, not the record of a defendant's conduct at the time of the arrest, that is relevant to our analysis. Arguably, if

the threshold requirement for a DWAI was impairment to an appreciable degree, then a DWAI could be a DUI in Nebraska. However, it would still not conform to the requirement that the out-of-state conviction must be for DUI.

Colorado's statutes make a distinction between DWAI and DUI. The minimum threshold for proving a DWAI based on impairment in Colorado is impairment to the slightest degree. § 42-4-1301(1)(g). Impairment to the slightest degree cannot result in a conviction for DUI in Nebraska, which requires a showing of impairment to an appreciable degree. See, § 60-6,196; *State v. Batts*, 233 Neb. 776, 448 N.W.2d 136 (1989). Because the threshold for proving a DWAI in Colorado based on the level of impairment (slightest degree) is lower than the threshold for proving DUI based on the level of impairment (appreciable degree) in Nebraska, we cannot conclude that a conviction for DWAI based on impairment in Colorado would have been a conviction for DUI in Nebraska. Mitchell's conviction for DWAI does not meet the requirement set forth in *Garcia, supra*, that the out-of-state conviction be for DUI.

Mitchell pled guilty to DWAI in Colorado. While the evidence surrounding his arrest might show that Mitchell was more than slightly impaired, an enhancement is not proper simply because Mitchell's behavior could have resulted in a DUI conviction in Nebraska. For enhancement, the court examines the authenticated or certified copy of the prior conviction and whether the conviction was counseled. See *Garcia, supra*.

In the case at bar, the State did not present a prima facie case for enhancement because Mitchell was convicted of DWAI in Colorado and "the prior conviction must be for the offense of DUI." See *Garcia*, 281 Neb. at 9, 792 N.W.2d at 889. Neither the fact that Colorado's DWAI statute has no upper threshold regarding the level of impairment nor the facts surrounding the arrest are relevant to the enhancement.

CONCLUSION

Mitchell was convicted of DWAI in Colorado. This conviction could not be used to enhance the penalty for a conviction

of DUI in Nebraska. The Court of Appeals erred in concluding that a Colorado DWAI conviction could be used to enhance the penalty for a Nebraska DUI. Accordingly, the decision of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals with directions to remand the cause to the district court with directions to vacate Mitchell's sentence for fourth-offense DUI and to resentence him in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

RICHARD L. MOLCZYK, JR., APPELLANT, V. KERRIE K. MOLCZYK, APPELLEE.

825 N.W.2d 435

Filed January 25, 2013. No. S-11-1095.

1. **Judgments: Jurisdiction.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** An appellate court independently reviews questions of law decided by a lower court.
4. **Divorce: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.
5. **Courts: Jurisdiction.** Under the doctrine of jurisdictional priority, when different state courts have concurrent original jurisdiction over the same subject matter, basic principles of judicial administration require that the first court to acquire jurisdiction should retain it to the exclusion of another court. That is, a second court lacks jurisdiction over the same matter involving the same parties.
6. **Dismissal and Nonsuit: Jurisdiction.** An order of dismissal or dismissal by operation of law divests a court of jurisdiction to take any further action in the matter.
7. **Courts: Jurisdiction.** In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgment at any time during the term in which the court issued it.
8. **Courts: Dismissal and Nonsuit: Jurisdiction: Pleadings: Motions to Vacate.** A court treats a motion to reinstate a case after an order of dismissal as a motion to vacate the order, and a court normally has jurisdiction over a motion to vacate an order of dismissal and reinstate a case.
9. **Actions: Jurisdiction: Parties: Notice.** A motion to reinstate a dismissed action, of which the opposing party has notice, has jurisdictional priority over a later complaint filed in a different court involving the same subject matter and the same parties.