

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2
3 **LARRY JAY TOM**

4 Appellant,

5 vs.

6 **STATE OF NEVADA**

7 Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court
Docket No. 84287
District Court No. CR 21-7273

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9 **RESPONDENT'S ANSWERING BRIEF**

10
11 Appeal from Judgment of Conviction
12 Sixth Judicial District Court, County of Humboldt
13 The Honorable Michael R. Montero

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15
16
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1 JURISDICTIONAL STATEMENT

2 The Respondent does not object to Appellant's jurisdictional statement.

3 ROUTING STATEMENT

4 The Respondent does not object to Appellant's routing statement.

5 STATEMENT OF THE ISSUE

6 Respondent objects to Appellant's statement of the issues and notes the issue
7
8 as follows:

9 ISSUE I: Are Appellant's Prior Misdemeanor Convictions for Driving Under
10 the Influence of Alcohol in violation of *NRS 484C.110*, in case # 14 CR 00222 and in
11 case # 14 CR 00960, both in the Union Township Justice Court, Humboldt County,
12 Nevada, Constitutionally Valid for Enhancement Purposes?
13

14 STATEMENT OF THE CASE

15 The Respondent does not object to Appellant's statement of the case.

16 STATEMENT OF FACTS

17 The Respondent objects to Appellant's statement of the facts. The facts of this case
18 arose due to Appellant, on or about September 22, 2019, driving a motor vehicle at or
19 near the location of Olavarria Street and Pioneer Road in McDermitt, Humboldt
20 County, Nevada, under the influence of an intoxicating liquor in violation of *NRS*
21 *484C.110* and *NRS 484C.400*, after having committed two like offenses within the last
22 seven years, which had resulted in convictions, namely, an initial conviction for *NRS*
23 *484C.110* in case # 14 CR 00222 in the Union Township Justice Court, Humboldt
24
25

1 County, Nevada Humboldt County, Nevada on April 29, 2014, and a second
2 subsequent conviction for *NRS 484C.110*, in case # 14 CR 00960, in the Union
3 Township Justice Court, Humboldt County, Nevada on December 10, 2019. (*See*
4 *Appellant's Appendix Pages 1-25*).¹ On February 8, 2022, the Appellant was sentenced to
5 serve a minimum term of twenty-four (24) months and a maximum term of seventy-
6 two (72) months in the Nevada Department of Corrections, with credit for twenty-
7 seven (27) days served and a fine of \$2,000. (*See Appellant's Appendix Pages 32-35*).

8 9 10 STANDARD OF REVIEW

11 The Respondent argues that the standard of review for Issue I is an abuse of
12 discretion standard.

13 14 ARGUMENT

15 ISSUE I: Appellant's Prior Misdemeanor convictions for Driving Under the
16 Influence of Alcohol in violation of *NRS 484C.110*, in case # 14 CR 00222 and in case
17 # 14 CR 00960, both in the Union Township Justice Court, Humboldt County,
18 Nevada, are Constitutionally Valid for Enhancement Purposes.

19
20 ¹ The time delay between the arrest in case # 14 CR 00960 on December 12, 2014,
21 and Appellant's subsequent conviction on December 10, 2019, resulted from
22 Appellant's supervision in an unrelated criminal case being revoked twice, initially on
23 January 13, 2015 for eighteen (18) months, and again on February 13, 2017, for
24 twenty-four (24) months, for a prior Federal conviction for Sexual Abuse of a Minor
25 in violation of *18 U.S.C. § 2243*, which Appellant was convicted for on April 18, 2011.
Appellant's criminal history information was before the District Court at sentencing in
this case through the Appellant's Presentence Sentencing Report prepared by the
State of Nevada. Department of Public Safety, Department of Parole and Probation.

1 In the present case, Appellant challenges both his prior convictions in case # 14
2 CR 00222 and in case # 14 CR 00960, both in the Union Township Justice Court,
3 Humboldt County, Nevada, as being Constitutionally infirm in violation of the 5th
4 Amendment and 6th Amendment to the U.S. Constitution. (See *Appellant's Opening Brief*
5 *page 4*).

7 In *Hobbs v. State*, 127 Nev. 234, 251 P.3d 177 (2011), this Court noted:

8 "If the State seeks to use prior misdemeanor convictions to enhance a
9 current offense to a felony, it must also make an affirmative showing of
10 the constitutional validity of the prior convictions. *Dressier v. State*, 107
11 Nev. 686, 697, 819 P.2d 1288, 1295 (1991). This includes demonstrating
12 "either that counsel was present [during the prior misdemeanor
13 proceedings] or that the right to counsel was validly waived, and that the
14 spirit of constitutional principles was respected in the prior misdemeanor
15 proceedings." *Id.*" See *Hobbs v. State supra* 127 Nev. at 241, 251 P.3d at
16 181.

17 Three years earlier in *Picetti v. State*, 124 Nev. 782, 192 P.3d 704, 708 (2008), this
18 Court held in a similar vein that "in order to establish the validity of a prior
19 misdemeanor conviction offered for enhancement purposes, the State must
20 "affirmatively show either that counsel was present or that the right to counsel was
21 validly waived, and that the spirit of constitutional principles was respected." *Id.* See
22 also *Davenport v State*, 112 Nev. 475, 915 P.2d 878 (1996). In *Picetti*, this Court noted:

23 "Instead, we reaffirm our view that each case must be examined under
24 the totality of the facts and circumstances of that particular case.
25 Moreover, as this court concluded in *Koenig v. State*, "the realities of the
typical environment of such prosecutions in these courts of limited
jurisdiction cannot be ignored" and "the convenience of the parties and
the court should be given considerable weight."

1 *Picetti v. State*, 124 Nev. 782, 192 P.3d 704, 708, 709(2008).²

2 Moreover, this Court has consistently required that the State initially shoulder
3 this burden under *Picetti v. State, supra*, when relaying on a prior misdemeanor for
4 enhancement purposes, citing *Koenig v. State*, 99 Nev. 780, 672 P.2d 37 (1983) and
5 *Pettipas v. State*, 106 Nev. 377, 794 P.2d. 705 (1990).
6

7 In the present case, after the Appellant objected to the admissibility of both his
8 convictions for case # 14 CR 00222, and in case # 14 CR 00960, before the Union
9 Township Justice Court, Humboldt County, Nevada, as the Appellant was not
10 represented by counsel during these two prior proceedings, the District Court
11 reviewed both of the Appellant's convictions in careful detail, and found that "these
12 are valid convictions for "first and second DUI offenses". (*Emphasis original*). (See
13 *Appellant's Appendix Pages 41-45*).
14
15

16 Before the District Court noted that the Appellant's conviction in case # 14 CR
17 00222 was valid, the District Court found that the Justice Court documents in case
18 # 14 CR 00222, indicated that while the Appellant was self-represented, the
19 documents clearly showed the entry of his plea of no contest; the violation in which
20 Appellant was being convicted of; the sentence Appellant was to receive; that the
21
22

23 ² See *Koenig v. State*, 99 Nev. 780, 672 P.2d 37 (1983) and *State v. Freese*, 116 Nev. 1097,
24 1104, 13 P.3d 442, 447 (2000) where this Court previously noted that the "[t]he
25 totality of the circumstances test has been the standard for reviewing the validity of
guilty pleas for some years."

1 Appellant understood and agreed to the conditions of his sentence; that he waived his
2 right to be represented by counsel; that there was a reference to his Constitutional
3 Right to be represented by an attorney at all stages of these proceedings; that if he
4 could not afford an attorney, one would be appointed to represent him at no cost; and
5 that the Appellant had initialed this particular paragraph, as well as having done so on
6 two similar paragraphs in the Justice Court documentation for case # 14 CR 00222.
7
8 (*See Appellant's Appendix Pages 1-9; 41-45*).
9

10 As to case # 14 CR 00960, the District Court also found that this conviction
11 was also valid for enhancement purposes in this case. (*See Appellant's Appendix Page*
12 *45*). Specifically, as to the Justice Court documentation in case # 14 CR 00960 before
13 the District Court, the District Court noted that one document is signed indicating
14 that the Appellant understood his sentence; agreed to the sentence he received; that
15 he initialed on the arrangement paperwork that he was entitled to an attorney and that
16 he waived the right to an attorney; that he waived his right a second time to be
17 represented by counsel, which he also initialed and signed; and that there was a DUI
18 admonishment of rights form which Appellant had initialed and signed. (*See*
19 *Appellant's Appendix Pages 10-21; 41-45*).
20
21

22 In summary, based on the totality of the facts and circumstances in this case,
23 and the realities of the typical environment of misdemeanor DUI prosecutions in the
24 limited jurisdiction of Justice Courts in Nevada, and based on the record below,
25 Respondent has affirmatively shown that the right to counsel was voluntarily waived

1 by Appellant in both of his convictions and that the spirit of constitutional principles
2 were fully respected, as noted under *Picetti, supra, Davenport, supra* and *Koenig, supra*, as
3 shown by the Justice Court documentation in both case # 14 CR 00222, and in case
4 # 14 CR 00960, before the Union Township Justice Court, Humboldt County,
5 Nevada. As a result, the District Court did not abuse its discretion by allowing these
6 two particular convictions, as described above, to be used in the present case to
7 enhance the Appellant's conviction for a violation of Driving Under the Influence of
8 an Intoxicating Liquor in violation of *NRS 484C.110* and *NRS 484C.400*.
9

11 CONCLUSION

12 Based on the arguments above, the State of Nevada respectfully asks this Court
13 to affirm the sentence imposed in this case.
14

15 Furthermore, pursuant to *NRS 239B.030*, the undersigned hereby affirms this
16 document does not contain the social security number of any person.

17 Dated this the 31st day of May, 2022.

18 MICHAEL MACDONALD
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1 **ATTORNEY CERTIFICATION OF COMPLIANCE**

2 I hereby certify that this brief complies with the formatting requirements
3 of *NRAP 32(a)(4)*, the typeface requirements of *NRAP 32(a)(5)* and the type style
4 requirements of *NRAP 32(a)(6)* because this brief has been prepared in a
5 proportionally spaced typeface using Microsoft Word in type face of 14 point and
6 Garamond type face.
7

8 I further certify that this brief complies with the page or type volume
9 limitations of *NRAP 32(a)(7)* because, excluding the parts of the brief exempted by
10 *NRAP 32(a)(7)(c)*, it does not exceed 30 pages.
11

12 Finally, I hereby certify that I have read the respondent brief and to the
13 best of my knowledge, information, and belief, it is not frivolous or interposed for an
14 improper purpose. I further certify that this brief complies with all the applicable
15 *Nevada Rules of Appellate Procedure*, in particular *NRAP 23(e)(1)*, which requires every
16 assertion in the brief regarding matters in the record to be supported by a reference to
17 the page and volume number, if any, of the transcript or appendix where the mater
18 relied on is to be found. I understand that I may be subject to sanctions in
19 the event that the accompanying brief is not in conformity with the requirements of
20
21

22 ///

23 ///

24 ///

25 ///

1 the Nevada Rules of Appellate Procedure.

2 Dated this the 31st day of May, 2022.

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