

IN THE SUPREME COURT OF THE STATE OF NEVADA

|                      |   |                            |
|----------------------|---|----------------------------|
| LARRY JAY TOM,       | ) | Supreme Ct No. 84287       |
|                      | ) | District Ct No. CR 21-7273 |
| Appellant            | ) | Electronically Filed       |
| vs.                  | ) | Apr 14 2022 03:21 p.m.     |
|                      | ) | Elizabeth A. Brown         |
| THE STATE OF NEVADA, | ) | Clerk of Supreme Court     |
|                      | ) |                            |
| Respondent           | ) |                            |
| _____                | ) |                            |

**APPELLANT'S OPENING BRIEF**

**ATTORNEY FOR APPELLANT**

Humboldt County Public Defender  
Matt Stermitz, NSB # 3610  
Drawer 309  
Winnemucca, Nevada 89445  
775-623-6550

**ATTORNEY FOR RESPONDENT**

Humboldt County District Atty  
Michael Macdonald  
Drawer 909  
Winnemucca, Nevada 89445  
775-623-6363

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#### JURISDICTIONAL STATEMENT

The Sixth Judicial District Court entered a judgment of conviction on the 17<sup>th</sup> day of February, 2022. Appellant Appendix, hereinafter “AA”, p. 32. Larry Tom filed a notice of appeal on the 23<sup>rd</sup> day of February, 2022. AA, p. 32. Within the time permitted by NRAP 4.

NRS 177.015(3) grants this court jurisdiction to review the judgment of conviction appealed from.

#### ROUTING STATEMENT

This matter is presumptively assigned to the Court of Appeals, pursuant to NRAP 17(b)(1).

## STATEMENT OF ISSUES

Issue: The district court should not have utilized two misdemeanor convictions to enhance Larry Tom's conviction.

## STATEMENT OF THE CASE

Larry Tom plead no contest to driving under the influence with two prior convictions within the last seven years, a category B felony, in violation of NRS 484C.110 and NRS 484C.400. AA, p. 32.

The district court sentenced Larry Tom to a minimum term of 24 months and a maximum term of 72 months in the Nevada Department of Corrections. AA, p. 33.

Larry Tom appealed from the conviction. AA, p. 51.

## STATEMENT OF THE FACTS

On the 26<sup>th</sup> day of March, 2014, the State of Nevada charged Larry Tom, a resident of the Fort McDermitt Reservation, with driving under the influence-first offense, a misdemeanor in the Union Township Justice Court. AA, p. 1.

On the 26<sup>th</sup> day of March, 2014, Larry Tom, while incarcerated in the Humboldt County Detention Center, while apparently indigent and unable to make bail, and before any toxicology tests had apparently been

1 performed, was arraigned, plead no contest, waived his right to be  
2 represented by court appointed counsel and was sentenced in the Union  
3 Township Justice Court<sup>1</sup>. AA, p. 5 – 7. As set forth in the State of  
4 Nevada's sentencing exhibit 3. AA, p. 1 – 9.

6 On the 17<sup>th</sup> day of December, 2014, the State of Nevada charged  
7 Larry Tom with driving under the influence-second offense, a misdemeanor  
8 in the Union Township Justice Court. AA, p. 10.

10 On the 17<sup>th</sup> Larry Tom, while incarcerated in the Humboldt County  
11 Detention Center and while apparently indigent and unable to make bail,  
12 and before any toxicology tests apparently had been performed, was  
13 arraigned, plead no contest to the charge, and thereafter waived his right to  
14 be represented by court appointed counsel in the Union Township Justice  
15 Court. AA, p. 17- 19. On the 10<sup>th</sup> day of December, 2019, Larry Tom was  
16 sentenced<sup>2</sup>. AA, p. 14. As set forth in the State of Nevada' sentencing  
17 exhibit 1. AA, p. 10 - 21.

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22 <sup>1</sup> The State of Nevada was represented by Humboldt County District  
23 Attorney Mike Macdonald. AA, p. 3.

25 <sup>2</sup> The State of Nevada was represented by Humboldt County deputy  
26 district attorney Max Stovall. AA, p. 14.

1 On the 25<sup>th</sup> day of October, 2021, the State of Nevada charged Larry  
2 Tom with driving under the influence with two prior misdemeanor  
3 convictions within the last seven years, a felony, as defined by NRS  
4 484C.110 and NRS 484C.400. AA p. 22 – 23.

6 On the 14<sup>th</sup> day of December, 2021, Larry Tom plead no contest to  
7 driving under the influence with two prior convictions within the last seven  
8 years, a felony, as defined by NRS 484C.110 and NRS 484C.400. AA, p.  
9 26, 32.  
10  
11

12 On the 8<sup>th</sup> day of February 2022, the district court conducted a  
13 sentencing hearing. AA, p. 33, 36 – 50. During the proceeding the State  
14 of Nevada moved to admit Larry Tom's two prior misdemeanor convictions.  
15 AA, p. 41 – 42. The district court, over the objection of Larry Tom, admitted  
16 the two Union Township Justice Court misdemeanor convictions, and  
17 sentenced Larry Tom to a minimum term of 24 months and a maximum  
18 term of 72 months in the Nevada Department of Corrections. AA, p. 33, 41,  
19 42.  
20  
21  
22

23 Notwithstanding the fact Larry Tom appeared pro se at the two Union  
24 Township Justice Court misdemeanor proceedings, while the State of  
25 Nevada was represented by counsel. AA, p. 1 – 21. Notwithstanding the  
26  
27  
28

1 absence of a *Faretta* canvas at the misdemeanor proceedings. AA, p. 1 –  
2 21. Notwithstanding the absence of a finding on the record that Larry Tom  
3 was given an opportunity to make an oral statement, pursuant to NRS  
4 171.188(1), concerning his indigency and a request for appointment of  
5 counsel at the misdemeanor proceedings. AA, p. 1 – 21. And,  
6 notwithstanding the absence of a finding Larry Tom was competent to  
7 waive his constitutional right to be represented by an attorney at the  
8 misdemeanor proceedings resulting in the misdemeanor convictions. AA,  
9 p. 1 – 21.

#### 13 SUMMARY OF ARGUMENT

15 The conviction should be reversed. The misdemeanor convictions  
16 utilized to enhance Larry Tom's conviction to a felony were obtained in  
17 violation of rights guaranteed by the 6<sup>th</sup> Amendment. The convictions were  
18 constitutionally infirm. The matter should be remanded for a new  
19 sentencing hearing where at the defendant should be sentenced for first  
20 offense driving under the influence.

#### 23 ARGUMENT

25 NRS 178.397 provides, in pertinent part, that every defendant  
26 accused of a misdemeanor for which jail time may be imposed and who is  
27  
28

1 financially unable to obtain counsel is entitled to have counsel assigned  
2 from the time of his initial appearance. See *Alabama v. Shelton*, 535 US  
3 654, 655 (2002).  
4

5 NRS 171.188(1), provides, in pertinent part, the record in each case  
6 must indicate a defendant was provided an opportunity to make an oral  
7 statement regarding indigency and appointment of counsel and must  
8 indicate whether the defendant made such a statement or declined to  
9 request the appointment.  
10  
11

12 In order to represent himself, an accused must "knowingly and  
13 intelligently" forgo the assistance of counsel. *Faretta v. California*, 422 U.S.  
14 806, 835 (1975) (citing *Johnson v. Zerbst*, 304 U. S. 458, 464-465 (1938),  
15 *Cf. Von Moltke v. Gillies*, 332 U. S. 708, 724 (1948) (plurality opinion of  
16 Black, J.)). Although a defendant need not himself have the skill and  
17 experience of a lawyer in order competently and intelligently to choose self-  
18 representation, he should be made aware of the dangers and  
19 disadvantages of self-representation, so that the record will establish that  
20 "he knows what he is doing and his choice is made with eyes open."  
21  
22 *Faretta, supra* at 835, (citing, *Adams v. United States ex rel. McCann*, 317  
23 U.S. 269, 275 (1942).  
24  
25  
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1       Notwithstanding Supreme Court Rule 253<sup>3</sup>, or this court's holding in  
2 *Koenig v. State*, 99 Nev. 780 (1983)<sup>4</sup>, a *Faretta* canvas of an accused,  
3 should be required of all misdemeanants charged with driving under the  
4 influence.  
5

6       A misdemeanor conviction for driving under the influence is anything  
7 but petty. In addition to being punished by up to 6 months in jail, an  
8 offender will lose driving privileges. NRS 484C.090, 484C.220, 484C.400,  
9 484C.220. A punishment that may cripple the offender's meaningful  
10 employment opportunities during not only the suspension period, but in  
11 perpetuity, and restrict his ability to attend worship services, access  
12  
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17       <sup>3</sup> Supreme Court Rule 253 directs district courts to conduct a *Faretta*  
18 canvass. Not justice courts.  
19

20       <sup>4</sup> In felony cases an official court record must exist showing that the  
21 defendant was apprised of his constitutional rights and the consequence of  
22 his plea, and understood and waived them, and that there were no threats  
23 or promises that induced the guilty plea; however, the same stringent  
24 standard does not apply to guilty pleas in misdemeanor cases. *Koenig*,  
25 *supra* at 789.  
26  
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1 medical care and feed his family. See Nevada Constitution, Art. 1, Sec. 1;  
2 Art. 1, Sec. 4; Art. 1, Sec 9; Art. 1, Sec. 10; Art 1, Sec. 20.

3 The penalty and the direct collateral consequences of a misdemeanor  
4 driving under the influence conviction reflect a legislative determination that  
5 the offense of misdemeanor driving under the influence is a serious one.<sup>5</sup>

6  
7  
8 *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 541 (1989); *Andersen v.*  
9 *Eighth Judicial Dist. Court of Nev.*, 135 Nev. 321, 322-324 (2019).

10 (misdemeanor battery is a serious offense triggering a right to jury trial).

11  
12 Notedly, there is no constitutional right to self-representation in  
13 Nevada. Article 1, Section 8 states, in pertinent part, “in cases of petit  
14 larceny . . . or upon information, . . . the party accused shall be allowed to  
15 appear and defend in person **and with counsel** . . . ”. (emphasis added).

16  
17  
18 Fortunately.

19 As pointed out in *Faretta, supra*, at 839 (Burger, W., dissenting),  
20 there is nothing desirable or useful in permitting an accused person, even  
21

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22  
23 <sup>5</sup> Even a category A felony conviction will not result in the loss of a  
24 driver license. NRS 193.130. Nor is there a prohibition on plea bargaining.  
25 A category A felony. NRS 484C.420  
26  
27  
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1 the most uneducated and inexperienced to insist upon conducting his own  
2 defense to criminal charges. The reason for this hardly requires  
3 explanation. *Id.* The fact of the matter is that in all but an extraordinarily  
4 small number of cases an accused will lose whatever defense he may have  
5 if he undertakes to conduct the trial himself<sup>6</sup>. *Id.*

6  
7  
8 Notwithstanding this court's holding in *Koenig v. State*, 99 Nev. 780,  
9 789 (1983), an enhanced penalty for a driving under the influence  
10 conviction should not be based upon a prior misdemeanor conviction where  
11 the defendant in the prior misdemeanor prosecution was not represented  
12 by counsel or where there is no finding on the record, as required by SCR  
13 253 4(a), that the defendant was competent to waive his or her  
14  
15 constitutional right to be represented by an attorney after a *Faretta* canvas.  
16  
17  
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20 <sup>6</sup> Even the intelligent and educated layman has small and sometimes  
21 no skill in the science of law. Left without the aid of counsel he may be put  
22 on trial without a proper charge, and convicted upon incompetent evidence,  
23 or evidence irrelevant to the issue or otherwise inadmissible. *Id.* (*Citing*  
24 *Powell v. Alabama*, 287 U.S. 45 (1932)).  
25  
26  
27  
28

1 The Union Township Justice Court's failure to make a specific,  
2 penetrating and comprehensive inquiry of Larry Tom to determine whether  
3 he was indigent, and the Union Township Justice Court's failure to provide  
4 a record evidencing Larry Tom was given an opportunity to make an oral  
5 statement, pursuant to NRS 171.188(1), requesting appointment of  
6 counsel, and the Union Township Justice Court's failure to make a finding  
7 Larry Tom was competent to waive counsel and understood the  
8 consequences of his decision to proceed without counsel deprived Larry  
9 Tom of his rights to due process under the Sixth Amendment.  
10  
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13 Accordingly, the prior misdemeanor convictions were constitutionally  
14 infirm and should not have been admitted or used to enhance Larry Tom's  
15 conviction.  
16  
17

### 18 CONCLUSION

19 The matter should be reversed and remanded for a new sentencing  
20 hearing for first offense driving under the influence, a misdemeanor.  
21

22 Dated this 14<sup>th</sup> day of April, 2022.

23  
24 Matt Stermitz

25 Matt Stermitz # 3610  
26 Humboldt County Public Defender  
27 Drawer 309  
28 Winnemucca, Nevada 89445

1                                    ATTORNEY CERTIFICATE OF COMPLIANCE

2            I hereby certify that this brief complies with the formatting  
3 requirements of NRAP 32(a)(4), the typeface requirements of NRAP  
4 32(a)(5) and the type style requirements of NRAP 32(a)(6) because This  
5 brief has been prepared in a proportionally spaced typeface using Microsoft  
6 Word in type face of 14 point and Arial type face.  
7  
8

9            I further certify that this brief complies with the page- or type-volume  
10 limitations of NRAP 32(a)(7) because, excluding the parts of the brief  
11 exempted by NRAP 32(a)(7)(C), it does not exceed 6 pages.  
12

13            Finally, I hereby certify that I have read this appellate brief, and to the  
14 best of my knowledge, information, and belief, it is not frivolous or  
15 interposed for any improper purpose. I further certify that this brief complies  
16 with all applicable Nevada Rules of Appellate Procedure, in particular  
17 NRAP 28(e)(1), which requires every assertion in the brief regarding  
18 matters in the record to be supported by a reference to the page and  
19 volume number, if any, of the transcript or appendix where the matter relied  
20 on is to be found. I understand that I may be subject to sanctions in the  
21 event that the accompanying brief is not in conformity with the  
22 requirements of the Nevada Rules of Appellate Procedure.  
23  
24  
25  
26  
27  
28

1 Dated this 14th day of April, 2022.

2 Matt Stermitz

3 Matt Stermitz  
4 Humboldt County Public Defender

5 CERTIFICATE OF SERVICE

6  
7 Pursuant to applicable appellate rules, on the 14th day of April, 2022,  
8 the undersigned mailed a true and correct copy of the foregoing addressed  
9 to Larry Tom # 1253956, Northern Nevada Correctional Center, P.O. Box  
10 7000, Carson City, NV 89702.  
11

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13 Matt Stermitz

14 Matt Stermitz  
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