APPENDIX (A)

19CA1686 Peo v Novitskiy 07-01-2021

COLORADO COURT OF APPEALS DATE FILED: July 1, 2021

Court of Appeals No. 19CA1686
Gilpin County District Court No. 18CR206
Honorable Stephen M. Munsinger, Judge
Honorable David C. Taylor, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Sergey Genadievich Novitskiy,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE RICHMAN
Berger and Welling, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced July 1, 2021

Philip J. Weiser, Attorney General, Frank R. Lawson, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Sergey Genadievich Novitskiy, Pro Se

¶ 1 Sergey Genadievich Novitskiy appeals his conviction for felony driving while ability impaired (DWAI). He argues that based on the supreme court decision in *Linnebur v. People*, 2020 CO 79M, we must reverse his conviction and remand to the district court for further proceedings. However, we conclude that Novitskiy waived his right to a jury trial and to findings beyond a reasonable doubt as to his prior convictions.

¶ 2 He also argues that the evidence of the prior convictions was erroneously admitted into evidence, and that the evidence was insufficient to prove the prior convictions. We disagree and affirm his conviction.

I. Background

¶ 3 Following a high-speed vehicle pursuit, Novitskiy was apprehended by a Gilpin County Sheriff's officer and charged with vehicular eluding, driving under restraint, a traffic infraction for speeding, and felony DUI (DUI as a fourth or subsequent offense) in violation of section 42-4-1301(1)(a), C.R.S. 2020.

¶ 4 On the morning of the scheduled trial, while the empaneled jury venire was waiting, Novitskiy entered into a plea agreement. As recited by his counsel to the court, in Novitskiy's presence, he

stipulated to a charge of DWAI in exchange for dismissal of the other charges. But the agreement did not include a stipulation as to the three prior convictions relevant to the charge of felony DWAI.

¶ 5 Novitskiy's counsel asked the court to accept the stipulation and find that it provided a sufficient factual basis for a finding of guilt beyond a reasonable doubt as to the DWAI charge. Counsel then stated:

> Following the Court's findings regarding the DWAI, this case would then proceed into the phase of the trial where the District Attorney would need to prove prior offenses to the Court so that the Court can determine whether this is a misdemeanor offense or a felony offense.
>
> My client understands that if the Court finds by a preponderance of the evidence [that] he has committed three prior acts of driving under the influence or driving while ability impaired, the Court would find him guilty of the felony DUI.
>
> However, if the Court does not find three or more prior by a preponderance of the evidence, he would be found not guilty of the felony part of the DUI but would still be guilty of the misdemeanor DUI; that the Court would still take argument and evidence or exhibits from either party regarding that phase so there is no stipulation.

¶ 6 The trial court asked Novitskiy directly if (1) he had had enough time to discuss "this" with his attorney, to which he replied "absolutely"; (2) he understood "the deal" and agreed to it, to which he replied yes; (3) he had agreed because of force, threats, or coercions, to which he replied no; and (4) his agreement was voluntary, to which he replied "absolutely."[1]

¶ 7 The trial court announced that it would accept the agreement and, given the stipulation as to the DWAI, asked whether the potential jurors could be excused. There was no objection by either party, and the trial court recessed in order to excuse the waiting jurors. When the court returned, the matter proceeded to a bench trial on the prior convictions.

¶ 8 After the trial, the trial court concluded that the prior convictions had been proved by a preponderance of the evidence. As a result, Novitskiy's DWAI was elevated to a felony, resulting in a term of six years in the custody of the Department of Corrections.

¶ 9 In his pro se appellate brief, Novitskiy does not challenge his conviction for DWAI, but he argues that the felony conviction must

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[1] Although this advisement does not contain every aspect of the advisement outlined in Crim. P. 23(a)(5)(II), Novitskiy does not argue on appeal that the advisement was defective.

be reversed because the trial court applied an improper preponderance of evidence standard in determining that the prior convictions pertained to him. As noted, he also argues that various documents relating to the prior convictions were improperly admitted at the trial, and that the evidence was insufficient to prove the prior convictions.

II. Standard of Review

¶ 10 Novitskiy's argument regarding the scope of the DUI statute would normally require us to interpret the statutory language in section 42-4-1301(1)(a) and (2)(a). We review questions of statutory interpretation de novo. *Hendricks v. People*, 10 P.3d 1231, 1235 (Colo. 2000).

¶ 11 Of course, the supreme court has interpreted section 42-4-1301(1)(a) to mean that to obtain a felony DUI (or DWAI) conviction, the prosecution must prove to a jury, beyond a reasonable doubt, that (1) the defendant drove a "motor vehicle or vehicle"; (2) while "under the influence of alcohol or one or more drugs"; and (3) he had at least three prior drug- or alcohol-related driving convictions. *Linnebur*, ¶¶ 2, 41 (quoting § 42-4-1301(1)(a)).

¶ 12 Even though *Linnebur* would apply retroactively to Novitskiy's case, the People argue that either the doctrine of waiver or the doctrine of invited error (or both) applies to Novitskiy's appeal.

¶ 13 The doctrine of invited error prevents a party from complaining on appeal of an error that he or she has invited or injected into the case; the party must abide the consequences of his or her acts. Invited error is a narrow doctrine and applies to errors in trial strategy but not to errors that result from oversight. *People v. Rediger,* 2018 CO 32, ¶ 34.

¶ 14 Waiver, in contrast to invited error, is "the *intentional* relinquishment of a *known* right or privilege." *Id.* at ¶ 39 (quoting *Dep't of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984)). Waiver extinguishes error, and therefore appellate review. *Id.* at ¶ 40.

¶ 15 We cannot determine with certainty whether counsel for Novitskiy agreed to a bench trial, with a preponderance of the evidence standard, because of an oversight or for strategic reasons.

¶ 16 Nonetheless, because we agree with the People that Novitskiy knowingly and intentionally waived his right to a jury trial and to application of the reasonable doubt standard, we need not address this statutory claim.

¶ 17 We conclude that waiver applies here because Novitskiy's counsel plainly, directly, and without any prompting from the prosecution advised the trial court that Novitskiy desired to proceed to a bench trial under the preponderance of the evidence standard on the prior offenses. The stipulation was summarized accurately by the trial judge, and Novitskiy himself unambiguously assented to the stipulation. By agreeing to the stipulation, Novitskiy received the benefit of the dismissal of the serious charge of vehicular eluding, as well as the other traffic offenses.

III. Sufficiency of Evidence

¶ 18 We next address Novitskiy's claim that the evidence was insufficient to support the trial court's finding that the prosecution had proved he had three prior convictions for DUI or DWAI.

¶ 19 We review the sufficiency of the evidence de novo. *Maestas v. People*, 2019 CO 45, ¶ 13. In a case involving prior convictions for alcohol related offenses, we look at the evidence as a whole and in the light most favorable to the prosecution to determine if it "is substantial and sufficient to support a conclusion by a reasonable person that the defendant" is the person previously convicted. *People v. Jiron*, 2020 COA 36, ¶ 33 (quoting *People v. Carrasco*, 85

P.3d 580, 582 (Colo. App. 2003)), *cert. granted, judgment vacated, and case remanded*, No. 20SC344, 2021 WL 96460 (Colo. Jan. 11, 2021) (unpublished order). The prosecution is given the benefit of every inference that may reasonably be drawn from the evidence. *Id.*

¶ 20 To establish by a preponderance of the evidence that Novitskiy had three prior convictions, the prosecution was required to show that it was "more likely than not" that he is the same person who was convicted in the three prior incidents.

¶ 21 The prosecution alleged that Novitskiy had three convictions arising from an Arapahoe County case, a Jefferson County case, and a Denver County case. The trial court found all three convictions had been proved by a preponderance of the evidence. On appeal, Novitskiy challenges the sufficiency of the evidence only as to the Denver County case, contending that the records did not demonstrate he had such a conviction.

¶ 22 Novitskiy contends the evidence was insufficient to prove that conviction, docketed as number 00M03305, because a DMV driving history (Exhibit 24) showed the date of the violation as "18-March-2002," and the date of conviction as "07-Nov-2002," whereas

records from the Denver District Court (Exhibit 26) showed the date of the violation as "03/18/00," and the date of judgment entered as "05/12/00." He also argues that the spelling of his name on Exhibit 26 ("Novitsky") differed from the spelling on Exhibit 24 ("Novitskiy"). He submits that Exhibit 26 is therefore "unreliable, misleading and confusing."[2]

¶ 23 The trial court rejected this argument, finding by a preponderance of the evidence that Novitskiy is the person convicted in the Denver County case and that case was the third prior DUI or alcohol related conviction.

¶ 24 Reviewing the sufficiency of the evidence de novo, we conclude that it was sufficient to prove by a preponderance of the evidence that Novitskiy was convicted in Denver County case number 00M03305. The conviction record from the Denver County Court (Exhibit 26) is the more reliable exhibit, as it pertains to the very offense at issue. Exhibit 24, by contrast, is a lengthy summary of Novitskiy's driving violations. Moreover, the number of the case, which is not disputed, begins with the digits "00," both on Exhibit

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[2] Novitskiy also argues that Exhibit 29 should not have been admitted into evidence; we address this contention below.

26 and Exhibit 24. This numbering system indicates the case was filed in the year 2000, as indicated on Exhibit 26, not 2002, as indicated on Exhibit 24.

¶ 25 In addition, Novitskiy's criminal record, maintained by the Colorado Crime Information Center (CCIC), shows that the Denver arrest for DUI occurred on March 18, 2000, although, as discussed below, Novitskiy reported an alias at the time. A further proceeding in November 2002, to remove the false name from the Denver District Court record, is the date that appears on the DMV driving history (Exhibit 24).

IV. Admission of Evidence

¶ 26 Novitskiy also contends that (1) Exhibit 29, the CCIC record, was improperly admitted into evidence over his objection that it constituted hearsay; and (2) the prosecution's witness, Sheriff's Investigator Lussier, was erroneously allowed to testify as an expert as to the meaning of Exhibits 26 and 29 through hearsay testimony. However, Novitskiy made no objection to Lussier's testimony on these grounds.

¶ 27 We review a trial court's evidentiary rulings for an abuse of discretion. *Nicholls v. People*, 2017 CO 71, ¶ 17. If we find an

abuse of discretion, it is subject to harmless error review. *Id.* However, where no objection is made to a witness testifying as an expert, we review for plain error. *People v. Conyac*, 2014 COA 8M, ¶ 53.

A. CCIC Report

¶ 28 Novitskiy contends that the trial court erred in admitting the CCIC report over Novitskiy's hearsay objection. The People first contend that the CCIC report is a record of a regularly conducted activity, admissible as nonhearsay under CRE 803(6). This rule authorizes a court to admit into evidence "records of regularly conducted activity" when supported by an adequate foundation showing (1) the document was made at or near the time of the matters recorded in it; (2) the document was prepared by, or from information transmitted by, a person with knowledge of the matters recorded; (3) the person who recorded the document did so as part of a regularly conducted business activity; (4) it was the regular practice of that business activity to make such documents; and (5) the document was retained and kept in the course of a regularly conducted business activity. *People v. Flores-Lozano*, 2016 COA 149, ¶ 13. However, our review of the evidence at the trial does not

show that the foundational prerequisites for the admission of the report were offered by the prosecution, so we cannot agree that the exhibit is admissible as nonhearsay under CRE 803(6).

¶ 29 Alternatively, the People contend that the CCIC report is a public record properly admitted under CRE 803(8). Under CRE 803(8)(A), records of public offices or agencies setting forth "the activities of the office or agency" are admissible despite their hearsay character. *People v. Warrick*, 284 P.3d 139, 143 (Colo. App. 2011). Booking records that set forth the activity of a law enforcement agency, as opposed to subjective observations, are admissible under CRE 803(8)(A). *Id.* Exhibit 29 was identified as a public record maintained by the Colorado Bureau of Investigation.

¶ 30 We conclude that the CCIC report was properly admitted as a public record.

B. Investigator Testimony

¶ 31 In addition, Investigator Lussier's testimony was not improper expert opinion, nor was his testimony hearsay.

¶ 32 Lussier's testimony on direct examination did not constitute opinions; rather he identified Exhibits 26 and 29 as documents he located in the Gilpin County Sheriff's files relating to Novitskiy's

case and his criminal history. The documents were admitted over Novitskiy's objection that Exhibit 29 was hearsay as discussed in Part IV.A; there was no objection to the admission of Exhibit 26. Lussier then testified that Exhibit 26 reflected an arrest for DUI on March 18, 2000, and referred to the use of an alias.

¶ 33 We do not view this testimony as an opinion; rather, he testified to facts specifically available in public records. *Cf. Warrick*, 284 P.3d at 146. He did not express a view, judgment, or appraisal of the documents, their applicability, or their meaning.[3] Under these circumstances, the admission of his testimony was not error, much less plain error.

V. Conclusion

¶ 34 We affirm Novitskiy's conviction for felony DWAI.

JUDGE BERGER and JUDGE WELLING concur.

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[3] On cross-examination, Novitskiy's counsel elicited opinions from Lussier regarding whether the two exhibits related to the same person. But those opinions, if improper, were invited by Novitskiy, and we do not review them.

APPENDIX (B)

Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	DATE FILED: July 22, 2021
Gilpin County 2018CR206	
Plaintiff-Appellee: The People of the State of Colorado, v. **Defendant-Appellant:** Sergey Genadievich Novitskiy.	Court of Appeals Case Number: 2019CA1686
ORDER DENYING PETITION FOR REHEARING	

The **PETITION FOR REHEARING** filed in this appeal by:

Sergey Genadievich Novitskiy, Defendant-Appellant,

is **DENIED**.

Issuance of the Mandate is stayed until: August 20, 2021

If a Petition for Certiorari is timely filed with the Supreme Court of Colorado, the stay shall remain in effect until disposition of the cause by that Court.

The Court further notes that because appellant does not currently have a permanent address, a copy of this order is being provided to him through an email address he has provided to ensure he receives notice.

DATE: July 22, 2021

BY THE COURT:
Richman, J.
Berger, J.
Welling, J.

APPENDIX (C)

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: December 13, 2021
Certiorari to the Court of Appeals, 2019CA1686 District Court, Gilpin County, 2018CR206	
Petitioner: Sergey Genadievich Novitskiy, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2021SC602
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, DECEMBER 13, 2021.

Additional material from this filing is available in the Clerk's Office.