TRAFFIC RESOURCE CENTER for JUDGES

Issue Brief: Use of Out-of-State Prior Convictions to Enhance the Penalty of a Current Conviction

Issue Brief 4 Use of Out-of-State Prior Convictions to Enhance the Penalty of a Current Conviction (April 2015)

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When an individual is convicted of driving under the influence in their home state or elsewhere, that conviction may be used to enhance the penalty of subsequent DUI charges. This happens in one of two ways. Prior convictions may be used to enhance the charge (i.e. making it a felony rather than a misdemeanor) and the penalty, or prior convictions may impact licensing, with the DMV using prior convictions as a basis for license suspension. Both scenarios require the same analysis to determine whether a prior out-of-state conviction may serve as a predicate conviction for current purposes. Only if there is substantial similarity and substantial conformity between the relevant laws of the two states can the out-of-state prior conviction be used to enhance the current conviction. Additionally, the record of conviction must be sufficient to allow the current state to determine that the predicate facts would have supported a conviction in the current state. Only if the prior out-of-state offense would have served as a basis for a conviction

in the home state can it be used to enhance the penalty of a current conviction. How states treat out-of-state prior convictions varies from state to state and case to case, as each case requires an individual analysis of the out-of-state law that the individual was convicted of violating as compared with the comparable current state law.

Treatment of Out-of-State Prior Convictions by Courts Across the Country

ENHANCING CHARGES/PENALTIES

INDIANA

In State v. Akins (2005) , the defendant was arrested in Indiana for Driving Under the Influence and charged with a felony under Ind. Code § 9-30-5-3. According to the Code, the offense constitutes a class D felony—with greater penal consequences—if the person operating a vehicle while intoxicated has a previous DUI conviction within the last five years. The predicate offense for Akins felony charge was a 1999 Michigan conviction for operating a vehicle while intoxicated (under Mich. Comp. Laws § 257.625(1)).

The issue was whether the Michigan law and the Indiana law were substantially similar such that Akins's prior conviction in Michigan would subject him to the class D felony charge. In reaching the conclusion that the two statutes were substantially similar, the Indiana Supreme Court emphasized that for purposes of establishing substantial similarity, the correct comparison is between the Michigan statute at the time of the Michigan offense and the Indiana statute at the time of the Indiana offense. It did not matter what the Indiana statute was at the time of the Michigan offense. Applying those guidelines to their analysis, the Court found that although the two state statutes were phrased differently, they describe elements that were substantially similar.

VIRGINIA

In Corey v. Commonwealth (2003) , the defendant was convicted upon a guilty plea of Driving While Intoxicated, in violation of Va. Code. Ann. § 18.2-266. Corey had previously been convicted in the Eastern District of Virginia for DWI (1995) and in Fairfax County for DWI (1997). The trial court, finding that his prior federal conviction for DWI was a proper predicate offense for enhancement purposes, imposed an enhanced sentence under Va. Code Ann. § 18.2-270(C). Va. Code Ann. § 18.2-270(C), a recidivist statute, enhances the sentence of a defendant convicted of three or more Va. Code Ann. § 18.2-266 offenses within ten years from a misdemeanor to a felony. Corey argued that the federal statute, 36 C.F.R. §4.23(a)(2), was not substantially similar to Va. Code. Ann. § 18.2-266, as it criminalized conduct that the Virginia statute did not, and that therefore this should only be a misdemeanor, as it was his second offense within five years. In concurring with the defendant and reversing the decision of the trial court, the Court of Appeals of Virginia analyzed the similarity of the statutes under the principle that "if a person may be convicted of an offense under another jurisdiction's statute for conduct which might not result in a conviction under [a Virginia statute], the statutes are not 'substantially conforming." The court found that due to the differences in the two statutes and the lack of specificity in the conviction record, it could not conclude that a violation in one would be a violation in another, and, therefore, the prior federal conviction could not be used as a predicate offense for purposes of sentencing enhancement.

In Shinault v. Commonwealth (1984), the defendant was convicted of drunk driving and punished under Virginia Code § 18.2-270 as a third time offender. One of Shinault's prior convictions was in North Carolina. After carefully analyzing whether the North Carolina statute under which he was convicted, N.C. Gen. Stat. § 20-138(b) was substantially similar to the corresponding Virginia statute, Virginia Code § 18.2-269(3) so that it would suffice as a prior conviction, the Supreme Court of Virginia held that the two statutes were not substantially conforming , as the North Carolina statute required a conclusive presumption of guilt when the offender possessed a blood-alcohol level of .10, while the Virginia statute allowed for a rebuttable presumption of guilt under the same circumstances. Though there was a general likeness between the two statutes, the differing effect of the two presumptions was substantial, and, therefore, the North Carolina conviction should not have been considered a prior offense.

SOUTH DAKOTA

In State v. Ducheneaux (2007) , the defendant was charged with DUI, and an information was filed alleging that this was his third DUI offense (one of the prior offenses being a 2003 Colorado conviction). At issue was whether a conviction under Colorado's driving while ability impaired statute (DWAI) could be considered a prior driving under the influence offense under S.D. Codified Laws § 32-23-4.5. According to SDCL § 32-23-4.5, any prior offense committed by a defendant in any state in the past ten years may be considered a prior offense as long as it would have been a violation of SDCL § 32-23-1 if committed in this State. In reversing the circuit court's decision striking the information, the South Dakota Supreme Court found that although the

South Dakota statute didn't define the under the influence offense in detail like Colorado's DWAI statute, "[t]hey are substantially similar because, like our common-law definition, the Colorado statute only requires that the alcohol 'affect[s] the person to the slightest degree so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.'" Concluding that the circuit court incorrectly focused on considerations that were not relevant to determining whether the elements of the two statutes were substantially similar, the Supreme Court held that Colo. Rev. Stat. § 42-4-1301(1)(g) was substantially similar to S.D. Codified Laws § 32-23-1(2), and that the Colorado conviction could be considered a prior offense for enhancement purposes.

IMPACTING LICENSING

CALIFORNIA

In Moles v. Gourley (2003) , after Moles was convicted of a DUI in California, the California DMV suspended his driver's license, basing its decision to do so on a previous Virginia DWI conviction. After the Santa Clara County Superior Court concluded there was insufficient evidence that the conviction was for drunk driving and granted a writ to set aside the suspension, the Court of Appeal of California reversed and remanded with an order to reinstate the suspension.

California and Virginia are both party to the Driver License Compact, which provides for reciprocal treatment of out-of-state convictions as long as 1) a substantially similar statute exists in the two states, 2) there is sufficient proof of the driver's violation of the

statute, and 3) that not only the substance, but also the interpretation and enforcement of the law in the reporting state is substantially the same as that in the home state. In determining that the Virginia statute, Va. Code Ann. § 18.2-266, and the California statute, Veh. Code § 23152, were substantially similar, the Court compared the two laws, focusing on the differences in the two states' laws concerning the conduct the laws address and the types of vehicles that are covered. Though the Virginia statute was found to be broader than California's, ignoring the non-relevant portions of the statutes and comparing only the compact-specific portions, the Court found the two statutes to be substantially the same with respect to the conduct that they prohibit—driving a motor vehicle while intoxicated. They also found that the Virginia record that the DMV relied on when suspending Moles's license provided adequate proof that he was convicted for drunk driving in Virginia.

Therefore, "[t]he Virginia conviction thus is entitled to reciprocal treatment in California under the Driver License Compact," and suspension of Moles's license was proper.

VIRGINIA

In Robertshaw v. Commonwealth (2013) , Robertshaw pled guilty to Driving Under the influence of Alcohol in violation of 36 C.F.R. Sec 4.23(a)(1), the federal DUI statute. The Virginia DMV revoked his driver's license for a year pursuant to Va. Code Ann. § 46.2-389, and he appealed, arguing that the federal statute did not substantially parallel or conform to the Virginia statute, Va. Code Sec. 18.2-266. "The issue before the Court is whether the Commissioner erred in determining that the federal DUI statute under

which the Petitioner was convicted, 36 C.F.R. Sec 4.23(a)(1), substantially parallels and substantially conforms to the Virginia DUI statute, Va. Code Sec. 18.2-266."

Keeping in mind that "[A]nother state's law regarding driving while under the influence of intoxicants or drugs [need not] substantially conform in every respect to Code Sec 18.2-266. Only that prohibition of the other state's law under which the person was convicted must substantially conform," (Cox v. Commonwealth) the Court determined that the two statutes had common characteristics and were largely alike in substance. Though they were not identical, they need not have been—they only had to substantially conform. Because the relevant portions of the statutes were substantially similar and conformed, revocation of the driving privileges was not manifestly unjust.

In Cox v. Commonwealth of Virginia (1991) , Cox appealed a finding by the trial court that he was a habitual offender under Va. Code § 46.2-351. The Appellate Court reversed, finding that this determination was an error because the out-of-state (West Virginia) statute included several prohibitions that wouldn't be violations under the home state (Virginia) statute and because the record of conviction from West Virginia was not specific enough to allow the court to determine that his conduct was included among Virginia's prohibition. As there was not substantial conformity between the two statutes and the record of conviction was inadequate, the West Virginia conviction could not be used to find the defendant to be a habitual offender.