

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,)	
)	
Plaintiff/Appellee,)	
)	
v.)	Supreme Court No. 20150069
)	
RUTHIE MANN,)	
)	
Defendant/Appellant.)	Burleigh Co. No. 08-2014-CR-02566

REPLY BRIEF OF APPELLANT

Appeal from the Criminal Judgment, dated February 17, 2015, and filed March 2, 2015,
entered by the Court following a jury verdict of guilty on the charge of

Refusal to Submit to a Chemical Test

Burleigh County District Court

South Central Judicial District

The Honorable James Hill

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TABLE OF CONTENTS

Table of Authorities	¶1
Law and Argument	¶2
Conclusion	¶5
Certificate of Service	¶7

[¶1] TABLE OF AUTHORITIES

North Dakota Statutes

N.D.C.C. § 39-08-01 ¶6

North Dakota cases

Onge v. Elkin, 376 N.W.2d 41 (N.D. 1985) fn.1

Schneider v. Baisch, 256 N.W.2d 370 (N.D. 1977) fn.1

State v. Barlow, 193 N.W.2d 455 (N.D. 1971) fn.1

State v. Emery, 2008 ND 3, 743 N.W.2d 815 ¶4

State v. Keyes, 536 N.W.2d 358 (N.D. 1995) fn.1

State v. Slapnicka, 376 N.W.2d 33 (N.D. 1985) fn.1

Federal circuit opinions

Austin v. Perini, 434 F.2d 752 (6th Cir. 1970) fn.1

Runge v. United States, 427 F.2d 122 (10th Cir. 1970) fn.1

United States v. Briscoe, 428 F.2d 954 (8th Cir. 1970) fn.1

United States v. Karger, 439 F.2d 1108 (1st Cir. 1971) fn.1

United States v. McElya, 439 F.2d 548 (D.C. Cir. 1970) fn.1

Williamson v. State of Alabama., 441 F.2d 549 (5th Cir. 1971) fn.1

Woodward v. United States, 426 F.2d 959 (3rd Cir. 1970) fn.1

[¶2] LAW AND ARGUMENT

[¶3] The State agrees with Ms. Mann that her felony conviction should be vacated and this matter should be remanded for sentencing only as a misdemeanor, first-offense DUI. The State's candor and professionalism is laudable.

[¶4] The parties also do not believe that resolution of this case involves an enhancement issue. However, if this Court believes this is an enhancement issue, then “[t]he record before us does not contain evidence of a prior counseled conviction ... nor of a waiver of counsel by [the Defendant] in the prior DUI proceeding.” *See State v. Emery*, 2008 ND 3, ¶8, 743 N.W.2d 815. The parties agree that Exhibits 2 and 3 are insufficient to establish prior counseled convictions. Additionally, whatever materials the judge was holding at the bench were never disclosed to the parties and were never admitted into evidence.¹

¹ Also, the Court’s reliance on *State v. Keyes*, 536 N.W.2d 358, 360 (N.D. 1995) was misplaced. The ruling in *Keyes* did not stay true to the *Barlow* waiver rule, and indeed distorted *Barlow*.

In *State v. Barlow*, this Court stated: “it is established that a voluntary plea of guilty constitutes a waiver of all nonjurisdictional defects in the proceeding up to that point.” *See State v. Barlow*, 193 N.W.2d 455, 457 (N.D. 1971) (emphasis added). *Barlow* speaks of waiver of defects, defenses, and events in “that proceeding,” not going back years before. The *Barlow* waiver, along with the numerous federal circuit decisions that underpinned *Barlow*, did not go backward in time prior to that proceeding and do not even suggest that a waiver in the instant case is a waiver of the determination of whether a prior conviction was counseled.

The *Barlow* court cited the rule from the federal circuits: *Williamson v. State of Alabama*, 441 F.2d 549, 550 (5th Cir. 1971) (“a voluntary plea of guilty constitutes a waiver of all non-jurisdictional defects in the proceeding up to that point”); *United States v. Karger*, 439 F.2d 1108, 1109 (1st Cir. 1971) (waives defects in that proceeding); *United States v. McElya*, 439 F.2d 548, 549-50 (D.C. Cir. 1970) (A defendant's voluntary plea of guilty entered after receiving advice of counsel waives objections to nonjurisdictional defects in his conviction in that proceeding); *Austin v. Perini*, 434 F.2d 752 (6th Cir. 1970) (voluntary plea waives all non-jurisdictional defects in the proceeding up to the guilty plea); *United States v. Briscoe*, 428 F.2d 954, 956 (8th Cir. 1970) (waives

[¶5] CONCLUSION

[¶6] Ms. Mann asks this court to vacate the Criminal Judgment and conviction in this matter, reverse the district court's denial of her Motion to Dismiss, order N.D.C.C. § 39-08-01(1)(e) be struck down, and order that Mann's refusal charge in this case be

defects and defenses in that proceeding); *Runge v. United States*, 427 F.2d 122, 127 (10th Cir. 1970) (A plea of guilty waives all non-jurisdictional defects and points of error in that proceeding); *Woodward v. United States*, 426 F.2d 959, 964 (3rd Cir. 1970) (A plea of guilty waives all non-jurisdictional defects and defenses in that proceeding). None of the cases cited in *Barlow* say that the waiver applies backward in time to a point beyond or outside the proceeding. The *Barlow* waiver is "a waiver of all nonjurisdictional defects in the proceeding up to that point." See *State v. Barlow*, 193 N.W.2d 455, 457 (N.D. 1971).

Indeed, our Court, in *State v. Slapnicka*, 376 N.W.2d 33, 35 (N.D. 1985), correctly applied the *Barlow* rule and held that the defendant waived his constitutional challenge in that proceeding by pleading guilty with counsel ("Slapnicka's guilty plea, accordingly, waived the alleged unconstitutionality of using an uncounseled guilty plea to enhance the penalty of a subsequent DUI conviction").

Keyes, on the other hand, distorted the *Barlow* rule, without citation to supporting authority, and wrongly alleged the *Barlow* waiver extended beyond that proceeding, going back years before. See *State v. Keyes*, 536 N.W.2d 358, 360 (N.D. 1995) ("Under *Slapnicka*, Keyes' 1991 counseled guilty plea waived the alleged defects in the 1988 and 1990 uncounseled guilty pleas."). The rule of *Barlow* should have dictated that Keyes waived challenge in the 1991 proceeding of using the 1988 and 1990 uncounseled convictions in that proceeding. By pleading guilty with counsel, Keyes waived challenge, in that proceeding, to use of the uncounseled convictions. Keyes had the choice of pleading guilty in the 1991 proceeding or mounting a constitutional challenge to use of the prior uncounseled convictions – he could not do both. By choosing to plead guilty, Keyes waived his potential challenge.

The *Barlow* waiver was never intended to extend outside of the instant "proceeding" (for example: if you plead guilty, you waive your challenge on the motion to suppress evidence "in that proceeding;" unless, of course, it is a conditional plea). The *Barlow* waiver addresses the waiver of nonjurisdictional defects and defenses "in the proceeding up to that point." However, from *Keyes* going forward, the law has shifted on analysis, without citation to supporting case law, that is inconsistent with *Barlow*. This shift in the law, without citation to supporting authority, is dangerous to the rule of law and it works a "grave injustice to the doctrine of stare decisis." See *Onge v. Elkin*, 376 N.W.2d 41, 43 (N.D. 1985). "[S]tare decisis is the blessing of certainty in the law." See *Schneider v. Baisch*, 256 N.W.2d 370, 372 (N.D. 1977) (Vogel, J., dissenting).

dismissed. If this Court does not provide the aforementioned relief, Mann asks that her felony conviction be vacated and that this matter be remanded for sentencing only as a misdemeanor, first-offense DUI.

Respectfully submitted
this 7th day of September, 2015.

/s/ Dan Herbel

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[¶7] CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on September 7, 2015, the REPLY BRIEF OF APPELLANT was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to Alexander Stock, Assistant Burleigh County State's Attorney, and Ken R. Sorenson, Assistant Attorney General, opposing counsel, at the following:

Electronic filing to: < bc08@nd.gov >

Alexander Stock, Assistant Burleigh Co State's Attorney

Electronic filing to: < ksorenso@nd.gov >

Ken R. Sorenson, Assistant Attorney General

Dated this 7th day of September, 2015.

/s/ Dan Herbel

Dan Herbel