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Court of Appeals
Division I
State of Washington

NO. 72142-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NJUGUNA GISHURU,

Appellant.

DISCRETIONARY REVIEW FROM THE SUPERIOR COURT FOR
KING COUNTY

THE HONORABLE JUDGE JEAN A. RIETSCHEL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. In the trial court and in his opening brief on appeal to the superior court, Gishuru accepted that the standard of proof at a pretrial hearing to determine if the Department of Licensing (“DOL”) revocation procedures complied with due process is either the “preponderance” or “clear and convincing” standard. For the first time in his reply brief on RALJ, Gishuru argued that the appropriate standard is “beyond a reasonable doubt.” Did Gishuru fail to preserve this new argument for review?

2. A person may not be convicted of the crime of driving with a suspended license unless the DOL’s revocation procedures complied with due process. Due process requires notice and an opportunity to be heard, and whether the DOL satisfied due process is a legal question to be decided by the trial court in a pretrial hearing. Does the State bear the burden of proving by a preponderance that due process was satisfied, or must it meet a higher standard?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Gishuru with one count of driving while license suspended in the second degree¹ (“DWLS 2”). CP 1. Pretrial, Gishuru

¹ RCW 46.20.342(1)(b).

moved to dismiss the charge, alleging that the DOL's process of generating, printing, and mailing revocation notices to drivers failed to satisfy procedural due process. CP 177-81.

At the pretrial hearing, the State called a DOL records custodian from the Suspensions Unit, which is responsible for updating and maintaining driver records based on information from arrest reports, courts, and other state agencies. CP 216-17. The records custodian conducted a search of Gishuru's driving record, reviewed the notice of revocation and Gishuru's address history, and testified that on August 19, 2011, the status of Gishuru's license was revoked in the second degree. CP 221.

The records custodian explained the process used by the DOL to generate, print, and mail a revocation notice to a driver. CP 221-22. The process begins when a Suspensions Unit customer service specialist receives an arrest report from a law enforcement officer, reviews the report, and enters it into the driver's personal record in the DOL computer system. CP 217. Depending on the type of offense, the computer system automatically generates a letter of suspension or revocation. CP 217, 223. A copy of the suspension or revocation letter, along with the arrest report and any other information received, is maintained as an image in a database. CP 218.

The revocation letters are printed overnight at a facility called Consolidated Mail Services ("CMS") and mailed to the last known address on file. CP 222, 231. If there is a printing error at CMS, the DOL is notified and it will regenerate the notice for mailing. CP 232. The DOL has been using CMS for many years. CP 232.

At the suppression hearing, the records custodian testified that the address on the revocation letter was Gishuru's last known address of record with the DOL, 7821 South 115th Place in Seattle. CP 229-30. The revocation letter was mailed on March 9, 2011, and contained the following certification of mailing:

I certify under penalty of perjury under the laws of the State of Washington that I caused to be placed in a U.S. Postal Service mailbox a true and accurate copy of this document to the person named herein at the address shown, which is the last address of record. Postage prepaid March 9, 2011.

CP 227, 229. Liz Luce, the director of the DOL, signed the certification.

CP 229. Liz Luce, however, did not personally mail the letter, because CMS processed all the DOL's mail. CP 235.

Gishuru did not testify or present any evidence at the pretrial hearing. He did not allege that he did not actually receive the notice, or that CMS encountered some sort of error in the printing and mailing process.

The King County District Court denied Gishuru's motion, finding that the DOL "accomplish[ed] the notice protocols that they intend[ed]" and that there was "substantial evidence that the notice went out." CP 245. In doing so, the trial court applied a preponderance standard of proof. CP 244.

A jury convicted Gishuru as charged, and he appealed. CP 11, 13.

On RALJ appeal, Gishuru argued that the trial court erred by denying his motion to dismiss for lack of procedural due process afforded to him by the DOL.² CP 461-63. For the first time in his reply on RALJ, Gishuru argued that the State was required to prove beyond a reasonable doubt that the DOL placed a notice of revocation in the mail. CP 499. The superior court affirmed Gishuru's conviction. CP 501. It found that the mailing procedures utilized by the DOL were sufficient to generate notice reasonably calculated to inform a driver of a pending revocation or suspension. CP 504. Additionally, despite the issue being raised for the first time in reply, the superior court also reached the issue of the appropriate standard and determined that at a pretrial suppression hearing

² On RALJ appeal, Gishuru also argued that the notice of revocation admitted at trial violated his confrontation rights and that the State was required to prove actual notice at trial. The superior court rejected those claims under this Court's decision in State v. Mecham, 181 Wn. App. 932, 331 P.3d 80, review granted, 337 P.3d 325 (2014).

to determine whether the DOL's procedures complied with due process, proof beyond a reasonable doubt was not required, and that a preponderance standard applied. CP 504.

2. SUBSTANTIVE FACTS

On August 19, 2011, University of Washington Police Officer Thomas Warwick stopped Gishuru for expired license plate tabs. CP 362. Gishuru provided his driver's license to Officer Warwick, who contacted dispatch to conduct a computer check of Gishuru's license status. CP 364-66. The officer's dispatch advised him that Gishuru's license was suspended. CP 367. Officer Warwick arrested Gishuru for driving with a suspended license. CP 367.

C. ARGUMENT

1. GISHURU WAIVED REVIEW OF THIS ISSUE.

A party is generally prohibited from "setting up an error at trial and then complaining of it on appeal." City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (quoting State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984)). Likewise, an issue raised for the first time on appeal is not subject to review unless it involves a manifest error affecting a

constitutional right.³ See RAP 2.5(a)(3); State v. Kirwin, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) (quoting State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). Nor may a defendant, for the first time on appeal, assert a theory that is significantly different from that underlying his pretrial suppression motion. United States v. Barrett, 703 F.2d 1076, 1086 n.17 (9th Cir.1983) (court refused to address grounds for suppression not raised at trial level); State v. Baxter, 68 Wn.2d 416, 423, 413 P.2d 638 (1966).

Furthermore, it is a well-established rule that appellate courts will not consider issues raised for the first time in a reply brief. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); Dykstra v. Skagit Cty., 97 Wn. App. 670, 676, 985 P.2d 424 (1999); RAP 10.3(c). This Court has recognized that it is imprudent to address complex issues for the first time on discretionary review “without the benefit of full development of the issues and complete briefing.” City of Bothell v. Barnhart, 156 Wn. App. 531, 538 n.2, 234 P.3d 264 (2010).

³ Under RAP 2.5(a)(3), a party may raise an issue for the first time on appeal only upon a showing of manifest error affecting a constitutional right. While the RAP generally governs criminal cases arising out of the Superior Court, RALJ 9.1 supports application of this rule to cases arising out of limited jurisdiction courts. It provides: “the superior court shall review the decision of the court of limited jurisdiction to determine whether that court has committed any errors of law.” RALJ 9.1(a). This Court has also spoken with approval of the RAP waiver rule in cases arising out of limited jurisdiction courts. See State v. Baldwin, 109 Wn. App. 516, 522, 37 P.3d 1220 (2001).

Here, Gishuru invited the error he now asks the Court to review. Before the trial court, Gishuru initially argued that it should require “substantial evidence that [notice] was sent.” CP 239. Later, when specifically asked by the trial court whether the standard of proof was “by a preponderance,” Gishuru replied that the appropriate standard of proof was clear and convincing evidence. CP 240 (“I don’t think so. I think with due process being afforded I think that, uh, I think that it’s clear and convincing.”). Notably, Gishuru did not ever ask the trial court to apply the beyond a reasonable doubt standard, nor did he argue that such a standard applied. See CP 215-45.

Further, Gishuru failed to assign error to the trial court’s standard of proof on RALJ, and failed to raise or mention the issue in his opening brief on RALJ. See CP 454-71. He raised the issue for the first time only in his reply. CP 499.

In his amended opening brief, Gishuru fails to explain why he is entitled to raise the issue for the first time on appeal—much less for discretionary review. See RAP 2.5(a)(3). Moreover, Gishuru’s position here explicitly contradicts his argument in the trial court that “substantial evidence” or “clear and convincing evidence” was required. Given that Gishuru invited the trial court to apply a different standard than the one for which he now advocates, and failed to raise this issue until his reply on

RALJ, Gishuru's appeal is improper. This Court should refuse to consider his claim.

2. WHETHER DOL LICENSE REVOCATION PROCEDURES ARE "REASONABLY CALCULATED" TO COMPLY WITH DUE PROCESS IS A LEGAL QUESTION TO BE ANSWERED PRETRIAL BY THE COURT USING A FLUID STANDARD.

Gishuru argues that this Court should reconsider its decision in State v. Mecham, 181 Wn. App. 932, 331 P.3d 80, review granted, 337 P.3d 325 (2014), but fails to demonstrate that the issues are appropriately before the Court on discretionary review or that the Court's decision in Mecham was clearly incorrect and harmful. Because the validity of a license revocation order is a legal question to be decided by a trial court at a pretrial hearing, and not an element of the crime of DWLS, the appropriate standard for the burden of proof is a fluid standard similar to the standard applied to other pretrial determinations. As such, the trial court's application of a preponderance standard was appropriate. Gishuru's conviction should be affirmed.

- a. The Validity Of A License Revocation Order Is A Legal Question For The Trial Court To Decide At A Pretrial Hearing, And Not An Element Of The Crime Of DWLS.

In his amended opening brief, Gishuru claims, "The first question this Court must answer is whether a pre-trial challenge to an

administrative license revocation order presents a mixed question of law and fact.” Am. Br. of App’t at 11. Likewise, Gishuru repeatedly argues that proof of mailing is an element of the crime of DWLS 2. Am. Br. of App’t at 14, 19-24. But this Court decided both these issues in State v. Mecham, when the Court explained:

[T]he fact of mailing is not an element of the crime to be proved at trial. Rather, mailing goes to whether license revocation complied with due process.

In a DWLS prosecution, the State must prove that a license revocation order complied with due process. However, the validity of the revocation order is a legal question for the court, not an element of the crime. The court, not the trier of fact, must make this threshold determination of validity.

181 Wn. App. at 950-51 (internal citations and footnote omitted).

Gishuru explicitly asks this Court to reconsider Mecham. Am. Br. of App’t at 12-13, 19-24. The Court should decline to do so for two reasons.

First, neither issue was raised in Gishuru’s petition for discretionary review, nor was review granted on either issue. In fact, this Court specifically ordered Gishuru to strike these arguments from his opening brief. See Notation Ruling granting Mot. to Strike entered May 7, 2015. Despite this order, Gishuru simply reorganized the headings of his amended opening brief and copied nearly identical text into his amended brief. Compare Br. of App’t at 26-40 and Am. Br. of App’t at 11-24. This

Court, having already ordered that the argument be stricken, should stand by its earlier decision to strike these arguments; Gishuru's attempt to evade the Court's ruling should not be rewarded.

Second, an appellate court will "abandon precedent only if it is clearly shown to be incorrect and harmful." State v. Njonge, 181 Wn.2d 546, 555, 334 P.3d 1068 (2014); State v. Stalker, 152 Wn. App. 805, 808, 219 P.3d 722 (2009). Here, Gishuru fails to show that this Court's decision in Mecham is clearly incorrect and harmful.

Gishuru initially argues that the decision in Mecham is incorrect because the Court failed to consider State v. Green, 157 Wn. App. 833, 239 P.3d 1130 (2010). Am. Br. of App't at 14. But Green is inapplicable on both its facts and the law.

Green involved a particularly convoluted and problematic set of facts. Green's son attended an elementary school in the Kent School District. Green, 157 Wn. App. at 838. Due to several incidents at the school involving Green, the school district issued a letter restricting Green from entering the school without prior permission except to pick up her son or to contact the office with questions about her son. Id. The district later issued a second letter clarifying that Green could enter the school for non-school related functions and to vote. Id. at 838-39. Despite the fact that Green had a statutory right to access her child's school

(see RCW 28A.605.020), neither letter addressed the process for appealing or challenging the trespass notice. Id. at 839, 845. Green nonetheless contacted the Kent School District Board of Directors and requested an opportunity to discuss the trespass notice; the school board declined to meet with Green, responding that it and the superintendent “had determined that further discussion was not necessary.” Id. at 839. The school board did not provide Green with any information on any further right of review. Id.

Prior to receiving the second letter, Green entered the school once outside of school hours to attend a holiday event with her son’s Boy Scout Troop. Id. at 840. School officials called the police and a police officer issued Green a trespass letter that excluded her from school grounds entirely for one year. Id. Green then entered the school twice more, first in an attempt to attend a parent-teacher conference that had been moved to the district’s administrative offices, and again to help her son pack up a science fair project. Id. at 840-41. Prior to entering the school the second time, Green sought and was denied permission to attend the science fair. Id. Green was arrested on both occasions. Id.

The State charged Green with two counts of criminal trespass in the first degree. Id. at 841. At trial, Green raised a statutory defense that she complied with all lawful conditions at the time of her entry into the

school, and then offered testimony challenging the factual basis underlying the trespass notice. Id. at 844. After a jury convicted her, Green appealed, arguing that the State failed to present evidence beyond a reasonable doubt that the restrictions on her access to the school campus were lawful, and that the trespass notice failed to comply with procedural due process.

This Court reversed Green's convictions. Id. at 853. The Court first explained that pursuant to RCW 9A.52.090 and City of Bremerton v. Widell, 146 Wn.2d 561, 51 P.3d 733 (2002), once a defendant charged with criminal trespass offers evidence that the entry was permissible under a statutory defense, the burden shifts to the State to prove beyond a reasonable doubt that the defendant lacked license to enter the property. Id. at 844. The Court rejected the State's argument that Green waived her opportunity to challenge the trespass notice, explaining that a trespass notice issued by a school district official lacks the procedural protections found in a judicial order, and therefore was not entitled to the same deference. Id. at 846.

The Court next applied the balancing test in Mathews v. Eldridge, 342 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), to determine whether the "right to appeal [the notice] was accompanied by sufficient procedural due process protections that any waiver of [Green's] right to appeal was

knowing and voluntary.” Id. at 846. The Court determined that “without notice of procedures to challenge the notice of trespass, no protection existed to prevent the erroneous deprivation of Green’s right to be at her child’s school.” Id. at 850. The Court then explained that, “[o]n these facts, issuing the notice did not relieve the State of its burden to prove the elements of criminal trespass, including facts necessary to prove that the school district’s exclusion of Green from school property was lawful.” Id. at 851. Finding insufficient evidence in the record to meet this burden, the Court reversed and dismissed. Id. at 851-53.

Gishuru suggests that Green stands for the proposition that the validity of any non-judicial order “is not a pure conclusion of law and therefore must be proven beyond a reasonable doubt.” Am. Br. of App’t at 15. He is mistaken for several reasons. First, Green involved a statutory defense not present in Gishuru’s case. It was the assertion of this statutory defense at trial that placed a burden on the State to disprove the defense beyond a reasonable doubt. Green, 157 Wn. App. at 844. The Court repeatedly explained that its decision turned “[o]n these facts.” Id. at 850, 851. In contrast to the factual burden placed on the State in Green, at the pretrial hearing at issue in this case, the question being answered by the trial court is not whether the facts underlying the license suspension are proven, but rather whether the DOL notice procedure conformed with

procedural due process. Green says nothing about the burden of proof on a constitutional due process challenge to agency action.

Second, the Court declined to afford deference to the notice of trespass in Green because it lacked procedural protections and did not comply with due process. Id. at 846-48. But the ad hoc process used by the school district in Green for issuing and modifying a trespass notice is far different than the standardized administrative procedure used by the DOL in issuing revocation notices. The process by which a notice of license revocation is issued is much more similar to the process by which a judicial order is issued than the seemingly improvised process of school district officials issuing several letters purporting to impose and modify conditions of entry onto school property. The procedural safeguards absent in Green are present in the DOL processes; the question of whether those safeguards were sufficiently effective is properly determined by the trial court pretrial. Close examination of Green does not call into question this Court's decision in Mecham.

Gishuru also claims that this Court "incorrectly recited the elements of the crime of driving while license suspended" in Mecham by failing to read a proof of notice element into the words "in effect" as used in RCW 46.20.342. Am. Br. of App't at 14. Gishuru then invites the Court to perform statutory interpretation to determine whether an

additional element of proof of notice should be read into RCW 46.20.342. Am. Br. of App't at 19-24. But the plain meaning of the statute contradicts Gishuru's claim.

An appellate court begins any statutory interpretation by examining the statute's plain language and ordinary meaning. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Statutes that are clear and unambiguous do not require interpretation. Id. When the plain language of a statute is unambiguous, legislative intent is apparent, and the court should not construe the statute otherwise. Id.

Here, the plain meaning of "in effect" is unambiguous. RCW 46.20.342(1)(b) provides:

A person who violates this section while an order of suspension or revocation prohibiting such operation is *in effect* and while the person is not eligible to reinstate his or her driver's license or driving privilege, other than for a suspension for the reasons described in (c) of this subsection, is guilty of driving while license suspended or revoked in the second degree, a gross misdemeanor.

(Emphasis added). As Gishuru concedes, "in effect" is the equivalent of "effective." Am. Br. of App't at 21. "Effective" is defined as "in operation at a given time." Black's Law Dictionary (10th ed. 2014). For example, "[a] statute, order, or contract is often said to be effective beginning (and perhaps ending) at a designated time." Id. Thus, as used in RCW 42.20.342(1)(b), "in effect" means that the revocation or

suspension order is in operation. In other words, RCW 46.20.342(1)(b) requires that the DOL revocation order cover a period of time that includes the time during which the defendant was driving.

This definition is consistent with the Court's ruling in Mecham, where the Court summarized the statutory language "while an order of revocation issued under chapter 46.65 RCW prohibiting such operation is in effect" as meaning "[the defendant's] privilege to drive *was revoked at the time.*" 181 Wn. App. at 950 (citing RCW 46.20.342(1)(a)) (emphasis added). The meaning of "in effect" in the statute is unambiguous and does not require interpretation: the term relates to the operability of the order at the time of the alleged crime. Gishuru's suggestion that the term should be read to mean "valid"—that is, to include an element requiring proof of mailing of the notice of revocation—is unsupported by the plain language of the statute.⁴

Gishuru fails to demonstrate either that review of these claims was properly granted or that this Court's recent decision in Mecham was clearly incorrect and harmful. The Court should reject his appeal.

⁴ Gishuru's claim that State v. Smith, 144 Wn.2d 665, 30 P.3d 1245 (2001), and State v. Thomas, 25 Wn. App. 770, 773, 610 P.2d 937 (1980), require proof of mailing beyond a reasonable doubt is also mistaken. Neither case suggests that proof of mailing is an element of the crime; rather, both cases consider proof of mailing in the context of procedural due process. Smith, 144 Wn.2d at 677; Thomas, 25 Wn. App. at 772.

- b. The Beyond A Reasonable Doubt Standard Is Inappropriate At A Pretrial Hearing To Determine If DOL Revocation Procedures Complied With Due Process Because Whether Notice Is “Reasonably Calculated” Is A Flexible, Non-Hypertechnical Standard.

Because a driver’s license is a property interest, the State must afford a driver due process of law before suspension or revocation. City of Redmond v. Arroyo-Murillo, 149 Wn.2d 607, 609, 70 P.3d 947 (2003). Due process prohibits deprivation of that protected property interest, absent appropriate procedural safeguards to minimize the risk of erroneous deprivation. See id. Such procedures must be “reasonably calculated to inform the affected party of the pending action and the opportunity to object.” State v. Dolson, 138 Wn.2d 773, 777, 982 P.2d 100 (1999). Notice is reasonably calculated if “[t]he means employed [are] such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” Jones v. Flowers, 547 U.S. 220, 229, 126 S. Ct. 1708, 1715, 164 L. Ed. 2d 415 (2006) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). Proof of actual notice is not required. Id. at 226.

The validity of a DOL revocation notice, i.e., whether the DOL complied with due process, is a legal question for the trial court, not an element of the crime. Mecham, 181 Wn. App. 932, 951, 331 P.3d 89

(2014). Validity is characterized as “applicability” to the charged crime: if notice is statutorily or constitutionally deficient, evidence of the revocation is not applicable to the charged crime, and should not be admitted. See State v. Miller, 156 Wn.2d 23, 31, 123 P.3d 827 (2005) (analyzing validity of domestic violence protection orders). If evidence of revocation is not admissible, the charge should be dismissed. Id. In other words, a violation of due process in the DOL procedures raises a barrier to the admission of revocation evidence in a subsequent criminal trial.

Thus, the due process inquiry in a DWLS prosecution is akin to other common suppression issues litigated before trial in a criminal case. Without much explanation, Washington courts have noted that the clear and convincing standard or a preponderance standard applies to such determinations, but never the reasonable doubt standard that Gishuru urges here. See State v. Campos-Cerna, 154 Wn. App. 702, 709, 226 P.3d 185 (2010) (the State must show a knowing, intelligent, and voluntary waiver of Miranda rights by a preponderance of the evidence); State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009) (the State must establish an exception to the warrant requirement by clear and convincing evidence, under the totality of the circumstances). Undersigned counsel is aware of no Washington case that has ever required proof beyond a reasonable doubt to such pretrial determinations, and in fact, Washington courts have

explicitly declined to do so. See, e.g., State v. Gross, 23 Wn. App. 319, 323, 597 P.2d 894 (1979) (rejecting reasonable doubt standard for waiver of Miranda rights).

The United States Supreme Court has repeatedly explained the difficulty in assigning “finely-tuned standards” such as proof beyond a reasonable doubt or even a preponderance of the evidence to preliminary legal inquiries. See Illinois v. Gates, 462 U.S. 213, 235, 103 S. Ct 2317, 76 L. Ed. 2d 527 (1983) (rejecting a measurable evidentiary standard for probable cause in favor of the totality of the circumstances approach). Most recently, in Florida v. Harris, ___ U.S. ___, 133 S. Ct. 1050, 1055-56, 185 L. Ed. 2d 61 (2013), the Supreme Court reiterated its position with respect to probable cause determinations:

A police officer has probable cause to conduct a search when the facts available to [him] would warrant a [person] of reasonable caution in the belief that contraband or evidence of a crime is present. The test for probable cause is not reducible to precise definition or quantification. Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence ... have no place in the [probable-cause] decision. All we have required is the kind of fair probability on which reasonable and prudent [people,] not legal technicians, act.

In evaluating whether the State has met this practical and common-sensical standard...[w]e have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach.... Probable cause, we emphasized, is a fluid concept—turning on the assessment of probabilities in particular factual contexts—

not readily, or even usefully, reduced to a neat set of legal rules.

Id. at 1055-56 [internal quotations and citations omitted].

Like a probable cause determination under the totality of the circumstances, whether the DOL complied with due process is a fluid concept that requires an assessment of probability of notice. It turns on whether that notice is “reasonably calculated to inform the affected party of the pending action and the opportunity to object.” Dolson, 138 Wn.2d at 777. Like a probable cause determination, this is a common-sense standard not easily reduced to a quantifiable level of proof. It does not require any hard certainty; it requires only what is reasonable.

Application of the beyond a reasonable doubt standard is inconsistent with the nature and purpose of the due process inquiry. First, in a due process challenge, proof of *actual* notice is not required. State v. Nelson, 158 Wn.2d 699, 702, 147 P.3d 553 (2006). Second, “[d]ue process does not require an error-free process, and the mere possibility of error is insufficient to invalidate the process.” City of Bellevue v. Lee, 166 Wn.2d 582, 585, 210 P.3d 1011 (2009). Third, a due process challenge necessarily involves the adequacy of the *method* of notice; it does not rest on whether notice was actually perfected. Thomas, 25 Wn. App. at 773. Gishuru’s argument implies that these principles of

procedural due process should be overruled, in favor of a stringent standard never before applied in such a context.

Because the State must prove the *existence* of the DOL revocation in a trial for DWLS 2, Gishuru attempts to draw an analogy to circumstances in which the State must prove the existence of a prior conviction to the jury, beyond a reasonable doubt. This tenuous analogy should be rejected. Gishuru relies on State v. Swindell, 93 Wn.2d 192, 607 P.2d 852 (1980), a case involving the unlawful possession of a firearm. In that case, the Washington Supreme Court held that the State bore the burden of proving that a prior conviction was constitutionally valid beyond a reasonable doubt; the existence of a prior conviction was a necessary element of the crime. Id. at 197. But the rule in Swindell was later clarified and narrowed: when the existence of a prior conviction is *an element of a crime*, a defendant may challenge the constitutional validity of the prior conviction, but first bears some burden of producing a “colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction. Only after the defendant has made this initial showing does the State’s burden arise.” State v. Summers, 120 Wn.2d 801, 812, 846 P.2d 490, 496 (1993).

Gishuru’s reliance on Swindell is misplaced for two reasons. First, as this Court explained in Mecham, “the fact of mailing is neither subject

to the confrontation clause, nor an essential fact to be proven at a DWLS trial.” 181 Wn. App. 951. This is in contrast to the prior convictions at issue in Swindell and Summers, where a valid conviction is an element of the crime. At a DWLS trial, the State must prove that an order of suspension or revocation was “in effect” at the time. RCW 46.20.342(1)(b). In other words, the State must prove beyond a reasonable doubt that “[the defendant’s] privilege to drive was revoked at the time.” Mecham, 181 Wn. App. at 950. Thus, while the State must prove beyond a reasonable doubt that the DOL revocation order was operable at the time of the crime, the State need not prove that notice was mailed beyond a reasonable doubt.

Second, even if such a rule did apply in a DWLS prosecution, Gishuru does not explain how he met his burden of production in this case, and thus shifted the burden to the State. Despite his representations otherwise to the trial court (see CP 237), Gishuru never claimed that he did not receive notice or that an error occurred during the mailing process. Instead, Gishuru merely stated the fact that he “did not request a hearing to contest his licensing revocation” and claimed that the DOL’s mailing process “failed to satisfy procedural due process requirements.” CP 178, 180. In other words, Gishuru presented only a generalized claim challenging the DOL mailing process used to provide notice, and failed to

offer a “colorable, fact-specific argument.” Even if the rule in Swindell applied to a DWLS prosecution—which it does not—Gishuru failed to meet the requirements of the rule.

Gishuru also urges the Court to apply the Mathews balancing test to determine what burden of proof is appropriate in this case. Am. Br. of App’t at 28-30. This argument mistakes the purpose of the Mathews test and its application in criminal cases. The Mathews balancing test is used to determine “the *procedural safeguards* to which an individual is entitled” pursuant to due process prior to deprivation of a protected interest. State v. Brousseau, 172 Wn.2d 331, 346, 259 P.3d 209 (2011) (emphasis added). Under the test, courts balance “(1) the significance of the private interest to be protected; (2) the risk of erroneous deprivation of that interest through the procedures used; and (3) the fiscal and administrative burdens that the additional procedural safeguards would entail.” Id. (quoting State v. Maule, 112 Wn. App. 887, 893, 51 P.3d 811, 77 P.3d 362 (2002)) (internal quotations omitted). In practice, the Mathews balancing test is used to examine whether a given *procedural process* includes sufficient safeguards to adequately comply with the requirements of constitutional due process.

Washington courts generally do not apply the Mathews balancing test in criminal cases, even when addressing due process issues.

State v. Hurst, 173 Wn.2d 597, 602-03, 269 P.3d 1023 (2012); State v. Heddrick, 166 Wn.2d 898, 904, 215 P.3d 201 (2009). Instead, Washington courts apply the test enumerated in Medina v. California, 505 U.S. 437, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992). Hurst, 173 Wn.2d at 603. “Under the Medina analytical framework, a state law governing criminal procedures, including the burden of producing evidence and the burden of persuasion, does not violate the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Id. (quoting Medina, 505 U.S. at 445) (internal quotations omitted). The few criminal cases where the Washington Supreme Court has applied the Mathews test involve competency determinations related to trial. See, e.g., Brousseau, 172 Wn.2d at 346 (competency of child witness to testify); Born v. Thompson, 154 Wn.2d 749, 755-57, 117 P.3d 1098 (2005) (competency of defendant in misdemeanor case). No competency issues are present in Gishuru’s case.

Washington courts have repeatedly analyzed what is required by the DOL for compliance with due process in DWLS cases without applying the Mathews balancing test. Due process is generally satisfied when the DOL complies with the statutory notice requirements. See Nelson, 158 Wn.2d 699; RCW 46.20.245(1) (requiring 45 days’ notice to

a driver given by deposit in the United States mail). Under some circumstances, a court must “consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case.” Nelson, 158 Wn.2d at 704. But regardless of the circumstances, the inquiry does not change: notice must be reasonably calculated, under all the circumstances, to apprise a driver of the pending revocation. Id.

Looking to the Medina analytical framework, the burden of proof applied by the trial court—proof by a preponderance—is appropriate, and does not “offend[s] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Hurst, 173 Wn.2d at 603 (quoting Medina, 505 U.S. at 445). The inquiry in which the trial court engages when analyzing due process compliance does *not* involve a hypertechnical or quantifiable level of proof. Rather, it requires a fluid standard that is satisfied when “[t]he means employed [are] such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” Jones, 547 U.S. at 228. Application of a preponderance standard to answer this question is consistent with Washington precedent for similar pretrial inquiries and does not offend due process. Gishuru’s appeal should be denied.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Gishuru's conviction.

DATED this 17 day of July, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Mr. Samuel Wolf, containing a copy of the Brief of Respondent, in STATE V. NJUGUNA GISHURU, Cause No. 72142-9-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

U Brame
Name
Done in Seattle, Washington

7/17/15
Date