

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 08-0279

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL E. DITTON,

Defendant and Appellant.

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**BRIEF OF APPELLEE**

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On Appeal from the Montana Eighteenth Judicial District Court,  
Gallatin County, The Honorable Holly B. Brown, Presiding

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APPEARANCES:

MIKE McGRATH  
Montana Attorney General  
C. MARK FOWLER  
Assistant Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

MICHAEL HENRY DITTON  
2210 Bridger Drive  
Bozeman, MT 59715

APPELLANT PRO SE

MARTY LAMBERT  
Gallatin County Attorney  
TODD WHIPPLE  
Deputy County Attorney  
1709 West College  
Bozeman, MT 59715

ATTORNEYS FOR APPELLEE

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## **STATEMENT OF THE ISSUES**

The guilt phase issues that Ditton raises on appeal are whether the municipal abused its discretion by:

1. Refusing to grant Ditton's motion to suppress for lack of particularized suspicion. (Issue A.)
2. Determining that the arresting police officer had authority and probable cause to stop and arrest. (Issue B.)
3. Refusing to dismiss for lack of probable cause to file the charge. (Issue C.)

Regarding his sentencing phase issue (Issue D), Ditton raises the issue of whether the Municipal Court erred in levying on his Veteran's Affairs disability income in the imposition of fines and costs. (State Concession.)

## **STATEMENT OF THE CASE AND FACTS**

The instant appeal before this Court is Appellant Michael Henry Ditton's (Ditton) second appeal arising from same operative facts. See Ditton v. Department of Justice, Motor Vehicles Div., 2008 MT 256N, 2008 Mont. LEXIS 394 (July 22, 2008, Mont Sup. Ct. Case No. DA 07-0194) (affirming denial of the Eighteenth Judicial District, Gallatin County, of Ditton's petition for reinstatement of his Montana driver's license).

Ditton's instant appeal is from the April 9, 2008, order of the Eighteenth Judicial District Court, Gallatin County, denying his Appeal from the Bozeman Municipal Court entering a conviction on February 5, 2007, for Driving under the Influence of Alcohol. In Ditton v. Department of Justice, ¶¶ 3-7, this Court recited the following facts:

At about 11:30 p.m., on August 19, 2006, Bozeman Police Officer Steven Crawford (Crawford) was driving through the parking lot of the Filling Station Bar and Grille in Bozeman when he observed a vehicle parked at an unusual angle within a row of vehicles with its lights and brake lights on and the engine running. Officer Crawford then observed the vehicle leave the parking lot and turn north. Crawford followed and noticed the vehicle weaving within its lane, crossing the fog line on the right side of the road, and driving on the double yellow centerlines. The driver signaled a right turn, missed the turn and drove partially off the roadway. At that point, Crawford turned on his emergency lights to signal the vehicle to stop. However, the vehicle backed up, drove forward, struck a stop sign post, then backed up again and drove forward approximately a car length before coming to a stop. Crawford turned on his siren because he did not think the vehicle was going to stop.

Crawford approached the vehicle and observed Ditton seated in the driver's seat. Ditton identified himself to Crawford with his driver's license. Crawford observed Ditton's eyes were glassy and bloodshot and his speech was slurred. Although he did not initially detect alcohol on Ditton's breath, he did so a little later. After administering field sobriety tests, Crawford requested Ditton provide a breath sample, which Ditton refused after Crawford read him the preliminary alcohol screening test advisory.

Crawford placed Ditton under arrest for driving under the influence of alcohol. After advising Ditton of his Miranda rights, Crawford asked Ditton how much he had to drink, to which he replied, "a lot." Crawford transported Ditton to the Gallatin County Jail, read the implied consent advisory to Ditton, and again requested

that Ditton provide a breath sample, which Ditton refused. The jail was overcrowded, so Crawford drove Ditton home.

\* \* \*

In the evidentiary hearing [on the Ditton's petition for reinstatement of his driver's license], both Ditton and Crawford testified. Crawford testified regarding his observations which had led to the stop. Crawford testified that, following his stop of Ditton, Ditton was methodical, but responded slowly and fumbled with the paperwork to produce his vehicle registration and proof of insurance. Crawford further testified Ditton failed field sobriety tests, that Ditton refused a breath test, and that Crawford then arrested Ditton for driving under the influence of alcohol.

The State will discuss additional record facts in the arguments that follow.

### **SUMMARY OF THE ARGUMENT**

**Guilt Phase Issues.** The district court correctly decided Ditton's appeal from the Municipal Court was merciless with respect to his guilt phases claims. Res judicata and collateral estoppel bar Ditton from attacking the legality of his traffic stop on August 19, 2006, and his arrest on the same date. This Court has already decided the same issues some months ago in Ditton v. Department of Justice, Motor Vehicles Div., 2008 MT 256N, 2008 Mont. LEXIS 394 (July 22, 2008, Mont Sup. Ct. Case No. DA 07-0194).

Even though res judicata and collateral estoppel do apply, this Court may judicially notice facts from that case. Previously established facts and law from that case, applied to the facts in the case at bar, compel the same conclusions: the

arresting officer had particularized suspicion to initiate an investigative stop, and the information he gathered during the stop ripened into probable cause to arrest Ditton for driving under the influence.

Circumstantial facts in this record show the Municipal Court judge made the statutory determination of whether probable cause existed to allow filing of the charge against Ditton. Ditton suffered no due process impairment. Ditton misinterprets the statute governing the scrutiny of sworn statements because the statute only requires a court to examine a sworn complaint if one is filed.

**Sentencing Phase Issue.** Without agreeing with all of the arguments advanced in Ditton's brief, or whether his arguments raised here for the first time are properly before this Court, the State concedes that under the facts and circumstances of this case the Municipal Court erred in imposing fines and costs of \$885 based on Ditton's VA benefit income.

### **STANDARD OF REVIEW**

When reviewing a district court's denial of a municipal court appeal, this Court reviews conclusions of law by the appellate district court for correctness. See, e.g., City of Missoula v. Lesko, 2003 MT 177, ¶ 7, 316 Mont. 401, 73 P.3d 166. The appellant has the burden of establishing district court error. State v. Bailey, 2004 MT 87, ¶ 26, 320 Mont. 501, 87 P.3d 1032. Moreover, in addition to

showing error, the appellant also has the burden of establishing prejudice. A cause may not be reversed by reason of any error committed by the trial court against the convicted person unless the record shows that the error was prejudicial. Mont. Code Ann. § 46-20-701(1).

## ARGUMENT

### **I. DITTON HAS FAILED TO SHOW THAT THE DISTRICT COURT INCORRECTLY HANDLED HIS MUNICIPAL COURT APPEAL WITH RESPECT TO HIS GUILT PHASE PROCEEDINGS. (ISSUES A THROUGH C.)**

#### **A. Issues A & B Are Barred By Res Judicata and Collateral Estoppel.**

In his first and second issues, Ditton respectively attacks the legality of his traffic stop on August 19, 2006 and his arrest on the same date. Some months ago, this Court decided the same issues presented by Ditton: the legality of his August 19, 2006 traffic stop and his arrest. Ditton v. Department of Justice, Motor Vehicles Div., 2008 MT 256N, 2008 Mont. LEXIS 394 (July 22, 2008, Mont Sup. Ct. Case No. DA 07-0194). In Ditton v. Department of Justice, Ditton contested the suspension of his Montana driver's license under Mont. Code Ann. § 61-8-401 and 402. This Court concluded that the district court did not err when it found particularized suspicion to justify the traffic stop and probable cause for the arrest. Ditton v. Department of Justice, ¶ 10 (citing Kleinsasser v. State, 2002 MT 36,

¶ 11, 308 Mont. 325, 42 P.3d 801, equating the “reasonable grounds” requirement contained in Mont. Code Ann. § 61-8-403(4)(a)(i) with “particularized suspicion” as defined in Mont. Code Ann. § 46-5-401).

The doctrines of res judicata and collateral estoppel both require dismissal of Ditton’s first and second issues, respectively contesting the particularized suspicion found to justify the traffic stop and the probable cause for his arrest.

This Court previously defined the doctrine of res judicata as follows:

The doctrine of res judicata states that a final judgment on the merits by a court of competent jurisdiction is conclusive as to causes of action or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction.

Harlem Irr. Dist. v. Judicial Dist. Court, 271 Mont. 129, 132, 894 P.2d 943, 944-45 (1995).

This Court’s opinion in Ditton v. Dept. of Justice determined the merits of whether particularized suspicion justified the traffic stop on August 19, 2006, by Bozeman Police Officer Steven Crawford (Crawford) and whether the facts and circumstances Crawford observed before and after the stop constituted probable cause to arrest Ditton. See id. at ¶ 8. Res judicata bars relitigation of Ditton’s Issues A and B here. Collateral estoppel is a form of res judicata which “bars the reopening of an issue in a second cause of action that has been litigated and determined in a prior suit.” Auto Parts of Bozeman v. Employment Rel. Div.,

2001 MT 72, ¶ 29, 305 Mont. 40, 23 P.3d 193. Since particularized suspicion and probable cause are issues in the determination of whether Ditton is entitled to overturn his DUI conviction, collateral estoppel applies to bar relitigation here.

Even if, for argument's sake, the doctrines of res judicata and collateral estoppel do not apply, this Court may take judicial notice of its own factual findings and legal conclusions established in Ditton v. Department of Justice. This Court has long held that courts may take judicial notice of records of the same case, related cases, and any other cases of the state. See Mont. R. Evid. 202 (Judicial Notice of Law); In re Estate of Nelson, 243 Mont. 276, 279, 794 P.2d 677, 679 (1990) (“the district court had before it the record of this case and had Brown v. Robbins, Cause No. DV 87-801. Had the latter been filed with this Court, we could have taken judicial notice of it”); see also Comm'n Comments to Mont. R. Evid. 202, 5 Mont. Code Ann. Annotations tit. 26, at 217; Association of Unit Owners v. Big Sky of Montana, 245 Mont. 64, 87, 798 P.2d 1018, 1032 (1990) (following the general rule that it could take judicial notice of facts established in a related case); Sikora v. Sikora, 160 Mont. 27, 34, 499 P.2d 808, 812 (1972) (holding that courts may take judicial notice of records of the same case and any other cases). Under Rule 202(b)(6) and (c), this Court may take judicial notice of law, including the records of any court of this state, and may inform itself of any law in such manner as it may deem proper.

Nevertheless, the factual and legal assertions presented in Ditton v. Department of Justice are the same as presented here and therefore demand the same result. Judicially established facts from that case include Crawford's observations that Ditton:

- parked his vehicle at an unusual angle within a row of vehicles with its lights and brake lights on and the engine running (id. at ¶ 3);
- drove his vehicle from the parking lot, turned north, and as Crawford followed, Ditton weaved within his driving lane, crossing the fog line on the right side of the road, then driving on the double yellow centerlines (id.);
- signaled a right turn, missed the turn and drove partially off the roadway (id.);
- drove his vehicle backward when Crawford turned on his emergency lights to signal a stop, and then Ditton drove forward, struck a stop sign post, then backed up again and drove forward approximately a car length before coming to a stop (id.);
- had glassy and bloodshot eyes and slurred speech (id. at ¶ 4);
- had alcohol on his breath (id.);
- was methodical but responded slowly and fumbled with the paperwork to produce his vehicle registration and proof of insurance (id. at ¶ 7); and,
- failed field sobriety tests and refused a breath test (id.).

These facts led this Court to conclude the district court did not err when it found particularized suspicion to justify the traffic stop and probable cause for the arrest. (Id. at 10.)

In this case, the district court here noted that the record supported facts showing Ditton:

- parked his vehicle in the parking lot of a bar at an odd angle to the surrounding vehicles (D.C. Doc. 42 at 5, citing R. 1:55:02);
- drove his vehicle from a bar in the early morning hours (id.);
- weaved in his own driving lane (id., citing R. 1:55:55);
- drove onto the center double yellow line for a significant period of time (id.); and,
- signaled for a right-hand turn, and then made a wide turn off of the roadway and onto the shoulder (id., citing R. 1:56:29).

The district court also noted Crawford's experience as a patrol officer with over twelve years on the force. (Id.) Moreover, the district court found here that Ditton:

- appeared to have been drinking as his eyes were glassy and bloodshot, his speech was slurred (D.C. Doc. 42 at 9, citing R. 2:00:33 and 2:00:40);
- when he was retrieving documentation requested by Crawford (id.); Ditton's movements were slow and methodical and he presented the wrong documents before finding the correct ones (id., citing R. 2:00:42);

- was very unsteady on his feet, visibly swayed, had trouble maintaining his balance, and performed unsatisfactorily on the field sobriety tests (id., citing R. 2:02:00 through 2:02:38);
- could not complete the one-leg stand or the alphabet recitation, as required by the field sobriety tests, and performed poorly on the others (id., citing R. 2:02:45); and,
- refused to take the portable breath test (id., citing 2:04:40).

Applying the judicially noticed facts and legal conclusions from Ditton v. Department of Justice compels the same result in the instant case. While it is “not illegal to cross the fog line or meander within a lane, . . . it is not necessary that an officer observe a moving violation to support a particularized suspicion of driving under the influence.” State v. Brander, 2004 MT 150, ¶ 6, 321 Mont. 484, 92 P.3d 1173 (noting that “the question is not whether any one of Brander’s driving aberrations was itself ‘illegal’ but rather, whether Deputy Roselles could point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion”).

Additionally, driving on the center line provides another piece of evidence supporting an officer’s particularized suspicion that an individual is driving impaired. Widdicombe v. State ex rel. Lafond, 2004 MT 49, ¶ 12, 320 Mont. 133, 85 P.3d 1271 (noting that although driving on the center line is not a traffic violation per se, “actually driving upon the yellow center line means the driver is no longer on the right side, but is driving in the center of the road. We have

previously said that ‘in itself, the driving of a vehicle into the wrong traffic lane may be sufficient to constitute a traffic violation under § 61-8-321, MCA.’”) citing In re Suspension of Driver’s License of Blake, 220 Mont. 27, 31, 712 P.2d 1338, 1341 (1986).

Crawford observed sufficient indicators to have particularized suspicion to warrant an investigative stop and was not required to observe an actual traffic violation. Whether or not driving on the yellow lines was a traffic violation, it was but one piece of objective data supporting Crawford’s inference that Ditton was involved in illegal activity. Whether or not each of Ditton’s driving aberrations is illegal, their totality amounts to specific and articulable facts from which Crawford inferred that Ditton was driving under the influence.

Further, Ditton’s actions during the investigatory stop provided Crawford with probable cause to arrest him for driving under the influence. Ditton’s poor driving, striking a stop sign post, the odor of alcohol, slurred speech, glassy eyes, and slow methodical movements, made it reasonable for an investigating officer to request field sobriety tests under these circumstances. After Crawford observed all of the above circumstances, and based upon Ditton’s poor performance on the field sobriety tests, Crawford had probable cause to lawfully arrest Ditton. The State will not discuss Ditton’s remaining argument concerning “citizen’s arrest powers” since he predicates his argument on the nonexistence of probable cause

(Appellant's Br. at 17), which the foregoing discussion by the State shows is bootless.

**B. Issue C Is Foreclosed by Precedential Application of State v. Ditton, 2006 MT 235, 333 Mont. 483, 144 P.3d 783.**

Ditton next complains that the Municipal Court never performed the process outlined in Mont. Code Ann. § 46-11-110, which states *in toto*:

When a complaint is presented to a court charging a person with the commission of an offense, the court shall examine the sworn complaint or any affidavits, if filed, to determine whether probable cause exists to allow the filing of a charge.

This Court has heard a similar complaint by Ditton before in the appeal of his previous DUI conviction. State v. Ditton, 2006 MT 235, ¶ 333 Mont. 483, 144 P.3d 783. In that case, Ditton cited § 46-11-110 and argued that because the Municipal Court made no determination of probable cause until nearly six months after the arrest and the charge, his case must be dismissed. Ditton, 2006 MT 235, ¶ 20. This Court disagreed, observing that Ditton failed to provide a transcript of the hearing at which Municipal Judge Carson testified. Ditton, 2006 MT 235, ¶ 23. Nevertheless, this Court decided it could otherwise infer that Judge Carlson had in fact made the necessary probable cause determination, which need not be in writing, based on the following circumstantial facts: 1) the district court determined that the statute was properly followed, and 2) that Judge Carlson's had

set Ditton's case for trial, which would not have been necessary without a determination of probable cause. Ditton, 2006 MT 235, ¶¶ 23-24.

Here, sufficient circumstantial facts show the Municipal Court complied with § 46-11-110. It should be noted that Ditton now includes a complaint about due process. (Appellant's Br. at 21-22.) Generally, due process requires that a person receive notice of an opportunity to be heard. In re T.C., 2001 MT 264, ¶ 22, 307 Mont. 244, 37 P.3d 70. The notice must be reasonably calculated to apprise that person of the pendency of the action, thereby affording him the opportunity to present objections. Byrd v. Columbia Falls Lions Club, 183 Mont. 330, 332, 599 P.2d 366, 367 (1979).

By law, Ditton presumptively gave his consent to test his blood alcohol concentration under Mont. Code Ann. § 61-8-402. Thus, the Municipal Court Judge knew, and Ditton was on notice as a matter of law, that his refusal to provide a blood sample when asked by Crawford permitted a legal presumption that he "was under the influence." Id. Further, he was arrested pursuant to Mont. Code Ann. § 46-6-312 and was thus advised of the nature of the arrest, who was arresting him, and the charge(s) to be filed. Ditton's citation allowed any judge to find probable cause that he was under the influence at the time he "operate[d] or [was] in actual physical control of a motor vehicle while under the influence of alcohol or drugs." Mont. Code Ann. § 61-8-404.

Just as in Ditton, 2006 MT 235, here the district court determined that Mont. Code Ann. § 46-11-110 was properly followed. (D.C. Doc. 42 at 10.) Similarly, at the hearing on Ditton’s § 46-11-110 assertion, Municipal Court Judge Seel responded that the Notice setting the matter for trial constituted the probable cause finding, that this Notice was issued, and that this satisfied the § 46-11-110 requirement. (D.C. Doc. 42 at 10.) Accordingly, under Ditton, 2006 MT 235, and based on all of the foregoing, the Notice to Appear and Complaint in this case was properly filed and Ditton has suffered no due process impairment.

Finally, Ditton’s complaint about the lack of sworn testimony is foreclosed by State v. Allum, 2005 MT 150, ¶ 38, 327 Mont. 363, 114 P.3d 233 (holding Mont. Code Ann. § 46-11-110 does not require a sworn complaint to be filed). This Court based its decision in Allum on a statutory reading of Mont. Code Ann. § 46-11-401(3) which requires the court to examine a sworn complaint if one is filed. Allum, ¶ 38. This Court pointed out that in 2001 the legislature replaced “signed on oath by a peace officer,” § 46-11-401(3) (1999), with “signed by a sworn peace officer.”

Ditton misreads Allum in trying to distinguish it. He argues that the appellant in Allum did not squarely present his argument. (Appellant’s Br. at 21.) Regardless of what an appellant raised, it is this Court’s clear exposition of state law that counts. See Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) (“state courts

are the ultimate expositors of state law”). The doctrine of stare decisis requires this Court to follow Allum as precedent unless the statutory interpretation in that case was “manifestly wrong.” Formicove v. Burlington N., 207 Mont. 189, 194-95, 673 P.2d 469, 472 (1983). Because the interpretation of Mont. Code Ann. § 46-11-401(3) is consistent with the unambiguous, plain language of that statute, Allum must be followed.

## **II. THE STATE CONCEDES ERROR IN THE MUNICIPAL COURT’S INCLUSION OF FINES AND COSTS BASED ON DITTON’S FEDERAL VETERAN’S BENEFITS. (ISSUE D.)**

Ditton cites federal law for his argument that his Veteran’s Affairs (“VA”) disability benefit of \$150 per month, his sole source of income, was unlawfully used by the Municipal Court in imposing \$885 in fines and costs. (Appellant’s Br. at 23-25, quoting 38 U.S.C. § 5301(a)(1) (VA benefit payments are “exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary.”)). Ditton never fairly presented this argument before any lower court.

In support of his argument, Ditton cites State v. Eaton, 2004 MT 283, 323 Mont. 287, 99 P.3d 661. In Eaton, the appellant argued that he was ordered to pay restitution equal to the amount of 20 percent of his net income, including

income from his Social Security benefits. He contended that this condition violated 42 U.S.C. § 407(a). This Court discussed § 407(a) and agreed with the appellant.

[§ 407(a)] provides that “none of the moneys paid or payable . . . under [the Social Security Act] shall be subject to ‘execution,’ ‘levy,’ ‘attachment,’ ‘garnishment,’ or other ‘legal process.’” [Citations omitted.] In Washington State Dept. of Social and Health Services v. Guardianship (2003), 537 U.S. 371, 385, 123 S. Ct. 1017, 1025, 154 L. Ed. 2d. 972, 974-75, the United States Supreme Court held that “execution,” “levy,” “attachment,” “garnishment,” or “other legal process” “are terms of art referencing to formal procedures by which one person gains a degree of control over property otherwise subject to the control of another, and generally involves some form of judicial authorization.” [Citations omitted.]

Here, the order is an improper attempt to subject Eaton’s social security benefits to “other legal process.” The State concedes that a direct attempt to levy upon social security benefits would violate § 407(a), but argues that Eaton can raise this defense at the time it would seek a levy. However, it is appropriate to eliminate the offending condition from the judgment in the first instance.

Thus, the judgment’s inclusion of Eaton’s social security income conflicts with the provisions of § 407(a), and we reverse the inclusion thereof.

Eaton, ¶¶ 25-27.

Without agreeing with all of the arguments advanced in Ditton’s brief, or whether they are properly before this Court, the Attorney General’s Office, with the knowledge and consent of the Gallatin County Attorney’s Office, hereby concedes that under the facts and circumstances of this case the Municipal Court

erred in imposing fines and costs of \$885, an amount based on Ditton's VA benefit income. Accordingly, this Court should remove the imposition of \$885 from Ditton's judgment and remand for entry of an amended judgment consistent herewith. See Eaton, ¶ 28 (affirming conviction, reversing part of suspended sentence that ordered restitution, and remanding "for entry of an amended judgment consistent herewith").

### **CONCLUSION**

The district court's denial of Ditton's appeal from the Municipal Court should be affirmed in all respects except the sentencing imposition of fines and costs of \$885. This Court should affirm Ditton's conviction and sentence but strike the imposition of \$885 from Ditton's judgment and remand for entry of an amended judgment consistent herewith.

Respectfully submitted this 30th day of September, 2008.

MIKE McGRATH  
Montana Attorney General  
215 North Sanders  
P.O. Box 201401  
Helena, MT 59620-1401

By: \_\_\_\_\_  
C. MARK FOWLER  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

Mr. Michael Henry Ditton  
2210 Bridger Drive  
Bozeman, MT 59715

Mr. Todd Whipple  
Deputy Gallatin County Attorney  
1709 West College  
Bozeman, MT 59715

DATED: \_\_\_\_\_

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

\_\_\_\_\_  
C. MARK FOWLER