





division of motor vehicles put the defendant on notice that he had been declared an habitual offender and revoked his driver's license.

Approximately six months later, on September 15, 1987, the defendant drove an automobile on Route 25, a public way in West Ossipee, and was subsequently indicted by the Carroll County Grand Jury for driving after being certified as an habitual offender. Prior to trial, the defendant moved to exclude the habitual offender finding on the ground that the administrative agency's failure to review the underlying convictions violated due process. The court authorized an interlocutory transfer of the admissibility issue, which we declined to accept. On remand, the court denied the defendant's motion to exclude, and he was tried and convicted.

The defendant concedes on appeal that the evidence presented to the court provided a sufficient basis for the court to find the defendant guilty of driving after being certified as an habitual offender, but argues that the court's guilty finding in this case should be reversed because the underlying administrative determination that he was an habitual offender was inadmissible to prove an element of the criminal offense. In particular, the defendant claims that the administrative proceeding denied him due process under the fifth amendment to the Federal Constitution because it provided no review of whether the underlying misdemeanor convictions were obtained with counsel or a valid waiver and placed the burden on him as an uncounseled defendant to disprove any fact in the motor vehicle record. We do not agree with the defendant's contentions.

The defendant's arguments are based upon a collateral attack on the underlying administrative hearing which classified him as an habitual offender. The general rule is that the defendant may not collaterally attack an habitual offender determination after having failed to appeal it, nor is he entitled to court-appointed counsel at the habitual offender hearing. *State v. Lemire*, 125 N.H. 461, 462, 481 A.2d 820, 821 (1984). Neither the State nor the federal due process clause requires that a defendant have counsel as a procedural safeguard in habitual offender proceedings, and an habitual offender order based upon uncounseled convictions of motor vehicle violations is valid. *State v. Cook*, 125 N.H. 452, 458, 481 A.2d 823, 828 (1984) (citing *Lewis v. United States*, 445 U.S. 55 (1980) (holding that it was permissible to refer to an earlier invalid conviction for the purpose of identifying a class to which a penal statute applied)).

The defendant was convicted under RSA 262:23 (Supp. 1988) for the crime of driving after having been certified as an habitual offender and was sentenced accordingly. RSA 262:23 (Supp. 1988) is part of a statutory scheme enacted to promote maximum safety on this State's roadways, to deny the privilege of driving motor vehicles to persons indifferent to the safety of others and disrespectful of the State's safety rules, and to discourage repeated traffic violations and punish habitual offenders. RSA 262:18. This statute is similar to Maine's habitual offender law, which uses

"... imprisonment sanctions to deter prospective motor vehicle operators from flouting the civil disability classification as an habitual offender, so long as the classification stands unreversed, ... notwithstanding any impairment in the proceedings leading to the habitual offender adjudication and regardless of the basis upon which the person was declared ineligible to operate a motor vehicle."

*State v. O'Neill*, 473 A.2d 415, 419 (Me. 1984). The focus here is not on the reliability of the individual convictions, but rather on the State's interest in preventing potentially dangerous persons from driving. As in *Lewis and Lemire*, the defendant in this case should have timely challenged the validity of his prior convictions or otherwise removed his disability before driving an automobile on a public way. See RSA 262:24 (Supp. 1988) (allowing a defendant to petition for reinstatement of license after expiration of revocation period imposed due to habitual offender status). The reliability of the predicate convictions is not at issue in the criminal proceeding to determine whether or not the defendant was guilty of driving after certification as an habitual offender. See RSA 262:23 (Supp. 1988); see also *O'Neill*, *supra* at 419.

Conviction on a charge of operation after certification as an habitual offender requires proof of two elements: (1) that an habitual offender order barring the person from driving a motor vehicle existed, and (2) that the person drove a motor vehicle on the ways of this State while the order prohibiting such driving remained in effect. See RSA 262:23 (Supp. 1988). There was no shift in the burden of proof on the essential elements of this crime. The hearings officer at the habitual offender proceeding correctly admitted the abstract of the defendant's conviction as *prima facie* evidence that the defendant was duly convicted of the prior offenses. RSA 262:19, I (Supp. 1988). "In the absence of sufficient evidence produced by the defendant to rebut the State's *prima facie* case, the State need not submit additional evidence to sustain its

burden of proof that the prior convictions were valid." *State v. Buckwold*, 122 N.H. 111, 112, 441 A.2d 1165, 1166 (1982).

The defendant's reliance on *United States v. Mendoza-Lopez*, 107 S. Ct. 2148 (1987), and other United States Supreme Court decisions involving collateral attack on administrative orders, is misplaced. In *Mendoza-Lopez*, the Court held that a deportation proceeding in which the defendants were deprived of their right to appeal could not be used to support a criminal conviction, *id.* at 2155, but noted that it was "the unavailability of effective judicial review of the administrative determination at issue that sets this case apart from *Lewis*." *Mendoza-Lopez*, 107 S. Ct. at 2156. Here, however, the defendant had a clear right of appeal under RSA 262:25 (Supp. 1988), and he acknowledges that he was advised of that right.

■ The analysis set forth in *Lewis v. United States*, 445 U.S. 55 makes the other cases cited by the defendant inapplicable. In *Lewis*, the United States Supreme Court found that a federal firearm regulatory scheme which provided criminal sanctions for any convicted felon possessing a firearm, whether or not the predicate felony might be subject to collateral attack on constitutional grounds, did not violate the due process clause of the fifth amendment. *Lewis, supra* at 65-67. In its analysis in *Lewis*, the Court found that although uncounseled felony convictions cannot be relied upon to support guilt or enhance punishment in criminal cases, they can be used in the enforcement of a civil disability status. *Lewis, supra* at 59-60, 66-67 (recognizing and distinguishing *Burgett v. Texas*, 389 U.S. 109 (1967); *United States v. Tucker*, 404 U.S. 443 (1972)). The habitual offender statute, which provides criminal sanctions for violation of a civil disability status, is susceptible to similar analysis. The certification of Canney as an habitual offender imposed upon him a civil disability in the form of lost driving privileges, but it was only after this status had been determined and he had violated the order that he became subject to criminal prosecution.

*Affirmed.*

JOHNSON, J., did not sit; the others concurred.