IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK A. FEJERVARY A/K/A MARK D. FEJERVARY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43182

FILED

DEC 2 9 2004

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of third-offense driving under the influence (DUI). Third Judicial District Court, Lyon County; Archie E. Blake, Judge. Appellant Mark A. Fejervary was involved in a two-car accident in which all three occupants of the second car were killed. The district court sentenced Fejervary to serve a prison term of 28-72 months, ordered him to pay a fine of $5,000.00, and gave him credit for 33 days time served.

First, Fejervary contends that the district court erred at sentencing by improperly admitting victim impact testimony. Fejervary argues that the victims' relatives should have been denied the opportunity to give impact testimony because the victims' deaths were not the direct result of his actions, and therefore, the relatives did not qualify as "victims" under NRS 176.015(5)(b).[1] Fejervary bases his argument on the justice's court's finding that there was no probable cause to bind him over

[1]NRS 176.015(5)(b) defines "victim" for purposes of victim impact testimony at sentencing as: "(1) A person, including a governmental entity, against whom a crime has been committed; (2) A person who has been injured or killed as a direct result of the commission of a crime; and (3) A relative of a person described in subparagraph (1) or (2)." (Emphasis added.)

to stand trial in the district court on multiple alternative counts of DUI causing death or reckless driving causing death. At the preliminary hearing, the justice of the peace concluded: "Court finds that the State has failed to show sufficient evidence that the accident was proximately caused or the damages were proximately caused by Mr. Fejervary's actions." We disagree with Fejervary's contention.

NRS 176.015(6) "does not restrict the authority of the court to consider any reliable and relevant evidence at the time of sentencing," and relevant sentencing evidence is not restricted solely to testimony by victims. The sentencing court retains the discretion "to consider a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant."[2] Further, "'judges spend much of their professional lives separating the wheat from the chaff and have extensive experience in sentencing, along with the legal training necessary to determine an appropriate sentence.'"[3]

Even assuming, without deciding, that the surviving relatives of the decedents were not "victims" pursuant to NRS 176.015(5)(b), we conclude that the admission of their victim impact testimony at sentencing was not error.[4] The district court stated that the "major factors" it considered at sentencing were Fejervary's criminal history, "and the

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[2]Martinez v. State, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998).

[3]See Randell v. State, 109 Nev. 5, 7-8, 846 P.2d 278, 280 (1993) (quoting People v. Mockel, 276 Cal. Rptr. 559, 563 (Ct. App. 1990)).

[4]See generally Wood v. State, 111 Nev. 428, 892 P.2d 944 (1995); see also Lane v. State, 110 Nev. 1156, 1166, 881 P.2d 1358, 1365 (1994), vacated on other grounds on rehearing, 114 Nev. 299, 956 P.2d 88 (1998) (recognizing that the erroneous admission of victim impact statements is subject to harmless-error analysis).

details of the event, which would include the level of intoxication, the driving pattern, what this Court considered the disregard of safety for the others on the highway, and the death of three people." The district court also stated that because Fejervary's conduct and driving "contributed" to the fatal accident, the surviving relatives qualified as "victims" pursuant to statute. We agree and conclude that the district court did not err in admitting the victim impact testimony.

Second, Fejervary contends that the district court erred by not awarding him sufficient credit for time served in presentence confinement. Fejervary was arrested in Lyon County on the instant DUI and was eventually released after posting bail. More than two months later, Fejervary was arrested and detained in Washoe County on unrelated charges. Fejervary argues that he is entitled to presentence credit in the instant case for the time spent in custody in Washoe County on unrelated charges. We disagree.

NRS 176.055(1) states: "whenever a sentence of imprisonment . . . is imposed, the court may order that credit be allowed against the duration of the sentence . . . for the amount of time which the defendant has actually spent in confinement before conviction . . . ." In Nieto v. State, this court stated "that a defendant is entitled to credit for time served in presentence confinement in another jurisdiction when that confinement was solely pursuant to the charges for which he was ultimately convicted."[5] Here, the district court conducted a hearing and determined that Fejervary was only entitled to credit for time served in the instant case for the time served in Lyon County because he was

[5]119 Nev. 229, 232, 70 P.3d 747, 748 (2003) (emphasis added).

detained in Washoe County on unrelated charges. Therefore, we conclude that the district court did not err in its determination of the credit award.

Finally, Fejervary contends that the district court erred in admitting a misdemeanor DUI conviction for enhancement purposes. He argues that the misdemeanor offense actually occurred subsequent to the instant offense, and the signed waiver of rights form he executed as part of the guilty plea to that misdemeanor conviction "misstates the law with respect to when a conviction may be used to enhance a conviction." The waiver of rights form, initialed and signed by Fejervary, stated: "I understand the State will use this and any other constitutionally valid prior conviction of this type of offense to enhance the penalty for any subsequent offense." (Emphasis added.) Thus, Fejervary apparently claims that the misdemeanor conviction is not only facially invalid for enhancement purposes, but also that he was misinformed at the earlier plea proceeding. Therefore, he asserts, the misdemeanor conviction was improperly used to enhance the instant conviction. Our review of the record reveals, however, that the district court did not err in admitting the misdemeanor conviction in question for enhancement purposes.

First, the above-referenced language in the misdemeanor guilty plea does not render that conviction legally or facially invalid for enhancement purposes. NRS 484.3792(2) unequivocally states: "An offense that occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section when evidenced by a conviction, without regard to the sequence of the offenses and convictions." (Emphasis added.) Thus, in light of the statutory definition in NRS 484.3792(2) of a "prior offense," Fejervary has failed to demonstrate that any language in the misdemeanor guilty plea misstated the law, misinformed him of the

consequences of his plea, or rendered the misdemeanor conviction facially invalid for enhancement purposes.

We note that this case is distinguishable from State v. Crist,[6] Perry v. State,[7] and State v. Smith.[8] The decisions in those cases were premised on the rule that a second DUI conviction may not be used to enhance a conviction for a third DUI offense to a felony where the second conviction was obtained pursuant to a plea agreement specifically permitting the defendant to enter a plea of guilty to a first-offense DUI and expressly limiting the use of the conviction for enhancement purposes. The decisions in Crist, Perry and Smith were "based solely on the necessity of upholding the integrity of plea bargains and the reasonable expectations of the parties relating thereto."[9] The rule that we recognized in those cases is not applicable here because "there is no plea agreement limiting the use of the prior conviction for enhancement purposes."[10]

Second, to whatever extent Fejervary attempted to attack the misdemeanor conviction based on the claim that he misunderstood or was misinformed of the terms and consequences of the plea, we conclude that the district court properly rejected the claim. Such a challenge to the knowing, voluntary, and intelligent entry of his misdemeanor guilty plea in the justice's court was not cognizable in the district court proceedings below concerning the instant offense. Underlying factual questions

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[6]108 Nev. 1058, 843 P.2d 368 (1992).

[7]106 Nev. 436, 794 P.2d 723 (1990).

[8]105 Nev. 293, 774 P.2d 1037 (1989).

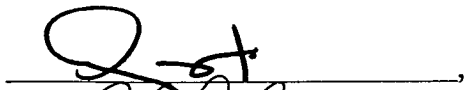
[9]Speer v. State, 116 Nev. 677, 680, 5 P.3d 1063, 1065 (2000).

[10]Id.

pertaining to whether Fejervary misunderstood or was misinformed of the terms and consequences of his plea are more appropriately raised in the first instance by way of a motion to withdraw the plea in the court where the plea was entered or in an appropriate post-conviction habeas corpus proceeding authorized by NRS Chapter 34. In sum, we conclude that Fejervary has failed to demonstrate that the misdemeanor conviction was facially invalid or that it was otherwise improperly used to enhance the instant DUI to felony status.

Having considered Fejervary's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
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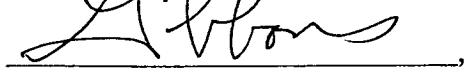

_____, J.
Gibbons

Becker, J., concurring:

I concur in the result. In my view, the victim impact testimony was not relevant, and the district court improperly admitted it. I conclude, however, that the error was harmless under the circumstances.

Becker _____, J.
Becker

cc: Hon. Archie E. Blake, District Judge
Lyon County Public Defender
Attorney General Brian Sandoval/Carson City
Lyon County District Attorney
Lyon County Clerk