

IN THE SUPREME COURT OF THE STATE OF NEVADA

GERALD LELAND BAILIE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51165

**FILED**

SEP 05 2008

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of felony driving under the influence (DUI). Second Judicial District Court, Washoe County; Janet J. Berry, Judge. The district court sentenced appellant Gerald Bailie to a prison term of 24 to 60 months.

First, Bailie contends that the district court erred by denying his motion to dismiss the felony charge against him. Bailie alleges that the 2005 amendment to NRS 484.3792, as applied in this case, violates the Ex Post Facto Clause of the United States and Nevada Constitutions<sup>1</sup> and his right to due process. In 2001, at the time of Bailie's prior felony DUI conviction, the law provided that that conviction would only be considered for seven years for the purposes of enhancement. In 2005, the law was amended so that if an individual had previously been convicted of felony DUI and was convicted of a subsequent DUI, he was guilty of a category B

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<sup>1</sup>U.S. Const. art. I, § 10; Nev. Const. art. 1, § 15.

felony regardless of how much time has passed since the last felony conviction.<sup>2</sup>

This court reviews a district court's decision to grant or deny a motion to dismiss for an abuse of discretion.<sup>3</sup> This court has previously considered a similar case and held that the Ex Post Facto Clause was not implicated because "[o]n the day [appellant] elected to commit the offense here under consideration, reference to the statute would have indicated precisely the penalty he risked."<sup>4</sup> In this case, regardless of what the law was at the time of Bailie's previous conviction, when he committed the instant offense the statute provided that he would be guilty of a category B felony because of his prior felony DUI. Therefore, the Ex Post Facto Clause was not implicated. Accordingly, we conclude that the district court did not abuse its discretion by denying the motion to dismiss.

Bailie also argues that convicting him of a felony in the instant case amounts to a violation of the plea agreements in his 1996, 1998, and 2001 cases. We reject this argument. The record does not indicate that the district court relied on Bailie's 1996 and 1998 prior misdemeanor DUI convictions to enhance the instant conviction to a felony. Rather, the record indicates that the instant offense was enhanced to a felony based solely on Bailie's 2001 felony DUI conviction. Bailie fails to demonstrate that his 2001 guilty plea agreement specifically limited his

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<sup>2</sup>2005 Nev. Stat. Spec. Sess., ch. 6, § 15, at 103.

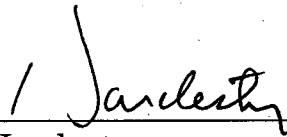
<sup>3</sup>Hill v. State, 124 Nev. \_\_\_, \_\_\_, \_\_\_ P.3d \_\_\_, \_\_\_ (Adv. Op. No 52, July 24, 2008).

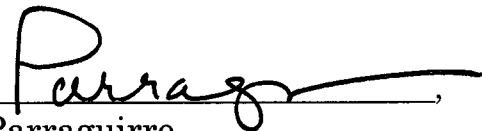
<sup>4</sup>Dixon v. State, 103 Nev. 272, 274, 737 P.2d 1162, 1164 (1987).

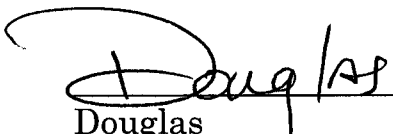
2001 felony DUI conviction for any enhancement purposes or that he was advised that the 2001 felony DUI conviction would be treated as anything other than a felony conviction.<sup>5</sup> Accordingly, we conclude that the application of the 2005 amendment to NRS 484.3792 did not constitute a violation or breach of Bailie's 1996, 1998, or 2001 plea agreements.

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

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

  
\_\_\_\_\_, J.  
Douglas

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<sup>5</sup>Compare State v. Smith, 105 Nev. 293, 298-99, 774 P.2d 1037, 1041 (1989) (holding that a second DUI conviction could not be used to enhance a subsequent DUI conviction to a felony when the second conviction was obtained pursuant to a guilty plea agreement that specifically permitted the defendant to plead guilty to a first-offense DUI and limited the use of that conviction for enhancement purposes), with Speer v. State, 116 Nev. 677, 680, 5 P.3d 1063, 1065 (2000) (holding that the rule recognized in Smith is not applicable where the plea agreement does not limit the use of the prior conviction for enhancement purposes).

cc: Hon. Janet J. Berry, District Judge  
Dennis A. Cameron  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk