

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LYLE CHARLES TUECKE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67403

FILED

NOV 19 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a guilty plea of driving under the influence of alcohol, third offense in 7 years. First Judicial District Court, Carson City; James E. Wilson, Judge.

Appellant Lyle Tuecke claims the district court erred at sentencing when it considered an invalid prior conviction for purposes of enhancing his crime to a felony. Specifically, he claims that being in physical control of a vehicle is different in Minnesota than it is in Nevada, and therefore, his driving while impaired (DWI) conviction in Minnesota did not punish the same or similar conduct as the offense of driving under the influence (DUI) does in Nevada. Because Tuecke failed to object to the use of this conviction below, this claim is subject to plain error review. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (reviewing unreserved claims for plain error).

We conclude Tuecke fails to demonstrate any error. A person who commits three DUIs in seven years is guilty of a felony. NRS 484C.400(1)(c). Prior offenses committed in other jurisdictions may be used to enhance a DUI to a felony if the law of the "other jurisdiction

prohibits the same or similar conduct.” NRS 484C.400(7)(c). The Nevada Supreme Court has held the “same conduct” need not be identical and the phrase same conduct “refers to the conduct of driving under the influence whether or not the particulars are identical.” *Jones v. State*, 105 Nev. 124, 127, 771 P.2d 154, 155 (1989).

In Minnesota, physical control of a vehicle requires the person to have “the means to initiate any movement of the vehicle, and he [must be] in close proximity to the operating controls of the vehicle.” *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010). It is a totality of the circumstances test and Minnesota takes into consideration: “the person’s location in proximity to the vehicle; the location of the keys; whether the person was a passenger in the vehicle; who owned the vehicle; and the vehicle’s operability.” *Id.* In Nevada, actual physical control takes into consideration similar factors:

Where, and in what position, the person is found in the vehicle; whether the vehicle’s engine is running or not; whether the occupant is awake or asleep; whether, if the person was apprehended at night, the vehicle lights were on; the location of the vehicle’s keys; whether the person was trying to move the vehicle or moved the vehicle; whether the property on which the vehicle is located is public or private; and whether he must, of necessity, have driven to the location where apprehended.

Rogers v. State, 105 Nev. 230, 233-34, 773 P.2d 1226, 1228 (1989).

While Nevada’s test has more factors to consider, both States prohibit the same or similar type of conduct. Further, Tuecke’s actual conduct in Minnesota was the same or similar to conduct prohibited in Nevada. In Minnesota, Tuecke was found asleep, in the driver’s seat of his truck at a grocery store. A bottle of vodka was found lying between the

seat and the floor. Tuecke admitted to drinking alcohol and sleeping in the truck. Therefore, there was no error, plain or otherwise, in the district court considering the Minnesota conviction to enhance Tuecke's DUI to a felony.

Next, Tuecke claims the district court erred by concluding he was ineligible for the driving under the influence (DUI) diversion program because of his prior DUI-related felony in Minnesota. NRS 484C.340(7)(d) and NRS 484C.340(7)(f) prohibit persons who have been previously convicted of felony DUI from applying to a DUI diversion program. He again claims his conviction in Minnesota for DWI was not the same or similar conduct as prohibited by Nevada law, and therefore, he did not have a prior "felony" DUI which would prohibit him from participating in a DUI diversion program. As stated above, his prior Minnesota DWI conviction was the same or similar conduct as prohibited by Nevada law. Therefore, the district court did not err by declaring him ineligible for the DUI diversion program on this ground.

Tuecke also claims the district court erred by concluding he was ineligible for the DUI diversion program because Minnesota's law enhances a misdemeanor DUI or DWI to a felony DWI when a person has three DWIs in 10 years. Nevada only enhances where a person has three DUIs in seven years. He would have only had two prior DUI convictions under Nevada law.


We conclude the district did not err by determining Tuecke was not eligible for diversion on this ground. The law in Minnesota prohibits similar conduct as does Nevada: habitually driving under the influence. Therefore, Tuecke is not entitled to relief on this claim.

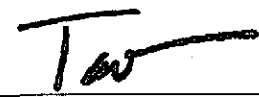
Further, we note the district court also concluded, even if the Minnesota conviction was not a prior felony conviction, it would not have allowed Tuecke into the DUI diversion program. The district court determined that Tuecke was still on probation for his DWI conviction in Minnesota, had four prior convictions for DUI, and was a danger to the public. We conclude the district court did not abuse its discretion by concluding Tuecke was not a good candidate for the DUI diversion program.

Finally, Tuecke claims the district court abused its discretion when it determined that he was not entitled to presentence credits. The district court found Tuecke was arrested, in part, because he violated his Minnesota probation and a hold was placed on him pursuant to the interstate compact. We conclude the district court correctly found Tuecke was not entitled to presentence credits because his confinement was pursuant to his DWI conviction in Minnesota. *See* NRS 176.055(1).

Having considered Tuecke's claims on appeal and concluded they are without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. James E. Wilson, District Judge
State Public Defender/Carson City
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk