

IN THE SUPREME COURT OF THE STATE OF NEVADA

BARRY EDWARD PEPPER,

No. 37022

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

**MAR 06 2001**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of driving and/or being in actual physical control of a vehicle while under the influence in violation of NRS 484.379 and NRS 484.3792(1)(c). The district court sentenced appellant to serve 18 to 60 months in prison and ordered appellant to pay a \$2,000.00 fine.

Appellant contends that the district court erred in using his second DUI conviction for enhancement purposes because he pleaded guilty to a first offense DUI in that case. Appellant therefore argues that the instant offense could not be enhanced to a felony.

Initially, we note that appellant failed to raise this issue when the district court considered the validity of the prior convictions for enhancement purposes. As a general rule, the failure to object or raise an issue in the district court precludes review by this court.<sup>1</sup>

Nonetheless, this court may address plain error.<sup>2</sup> For an issue to be considered under the plain error rule,

<sup>1</sup>Emmons v. State, 107 Nev. 53, 60-61, 807 P.2d 718, 723 (1991).

<sup>2</sup>See NRS 178.602; Libby v. State, 109 Nev 905, 911, 859 P.2d 1050, 1054 (1993), vacated on other grounds, 516 U.S. 1037 (1996).

appellant must demonstrate error that is plain or readily apparent from the record and that affected appellant's substantial rights.<sup>3</sup> An error that affects the substantial rights of a defendant is one that "affected the outcome of the district court proceedings."<sup>4</sup>

In State v. Crist,<sup>5</sup> Perry v. State,<sup>6</sup> and State v. Smith,<sup>7</sup> we held that a second DUI conviction may not be used to enhance a conviction for a third DUI arrest 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 limiting the use of the conviction for enhancement purposes. The decisions in those cases were "based solely on the necessity of upholding the integrity of plea bargains and the reasonable expectations of the parties relating thereto."<sup>8</sup> Accordingly, the rule that we recognized in those cases is not applicable where "there is no plea agreement limiting the use of the prior conviction for enhancement purposes."<sup>9</sup>

Here, the record indicates that appellant's second DUI arrest was charged as a first offense and that appellant pleaded guilty to the charged offense. But nothing in the record suggests that the conviction was obtained pursuant to a

---

<sup>3</sup>See NRS 178.602; United States v. Olano, 507 U.S. 725, 733-34 (1993); Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995); Libby, 109 Nev. at 911, 859 P.2d at 1054.

<sup>4</sup>Olano, 507 U.S. at 734; see also Libby, 109 Nev. at 911, 859 P.2d at 1054.

<sup>5</sup>108 Nev. 1058, 843 P.2d 368 (1992).

<sup>6</sup>106 Nev. 436, 794 P.2d 723 (1990).

<sup>7</sup>105 Nev. 293, 774 P.2d 1037 (1989).


<sup>8</sup>Speer v. State, 116 Nev. \_\_\_, \_\_\_, 5 P.3d 1063, 1065 (2000).

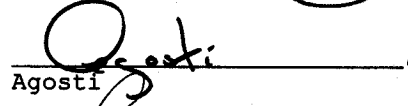
<sup>9</sup>Id.

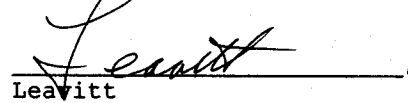
plea agreement specifically permitting appellant to enter a plea of guilty to first offense DUI and limiting the use of the conviction for enhancement purposes. There is no indication in the record that the prosecuting authority in that case was even aware that appellant had a prior DUI conviction. Under the circumstances, we conclude that appellant has failed to demonstrate that the district court committed plain error in permitting the State to use appellant's second DUI conviction to enhance the instant offense to a felony.

Having considered appellant's contention and concluded that it lacks merit, we

ORDER the judgment of conviction AFFIRMED.

  
Shearing J.

  
Agosti J.

  
Leavitt J.

cc: Hon. Kathy A. Hardcastle, District Judge  
Attorney General  
Clark County District Attorney  
Clark County Public Defender  
Clark County Clerk