IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERT LUCAS HERNANDEZ, JR.,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37665

FILED

JUL 10 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, VACATING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of driving under the influence, driving while having 0.10 percent or more by weight of alcohol in the blood, and having a blood alcohol level of 0.10 percent or more by weight of alcohol in the blood within two hours of driving. The district court sentenced appellant to three terms of 12 to 36 months in prison, to be served concurrently.

Appellant contends that the district court erred by using his 1998 conviction in Reno Justice Court for driving with 0.10 percent or more by weight of alcohol in the blood. In particular, appellant argues that although the 1998 conviction was chronologically his second DUI offense within a 7-year period, because it was treated as a first offense, it cannot be used to enhance the instant offense to a felony.

In Speer v. State,[1] we explained the limitations on the State's use of a second DUI conviction for enhancement purposes where the conviction was based on a plea agreement that allowed the defendant to plead guilty to a first offense DUI and limited the use of the conviction for enhancement purposes. Specifically, we stated that

[1]116 Nev. ___, 5 P.3d 1063 (2000).

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> 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 guilty plea agreement specifically permitting the defendant to enter a plea of guilty to first offense DUI and limiting the use of the conviction for enhancement purposes.[2]

But we also made it clear that the preceding rule does not apply where "there is no plea agreement limiting the use of the prior conviction for enhancement purposes."[3] Under such circumstances, any two prior DUI offenses may be used to enhance a subsequent DUI to a felony as long as the prior offenses occurred within 7 years of the principal offense and regardless of whether the prior offenses were punished as "first" or "second" offenses.[4]

Here, appellant's 1998 conviction was the result of a plea agreement. At the sentencing hearing, the State did not have a certified judgment of conviction evidencing appellant's prior DUI conviction. Accordingly, the justice court sentenced appellant under the provisions for a first offense. When appellant's counsel in the 1998 proceedings attempted to argue that the State's failure to prove the prior conviction meant that the 1998 conviction would be a first offense and appellant would have "to obtain two more DUI's in order to get [] his third," the justice court and the State disagreed. The record of those proceedings indicates that the 1998 conviction was not obtained pursuant to a plea agreement that specifically allowed appellant to plead guilty to a first offense and limited the use of the conviction for enhancement purposes. Rather, the sentencing as a first offense arose because of the State's failure to present evidence of

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[2]Id. at ___, 5 P.3d at 1065.

[3]Id.

[4]Id. at ___, 5 P.3d at 1064.

appellant's prior conviction at the time of sentencing. Accordingly, the instant case is similar to Speer, and we conclude that the district court did not err in using the 1998 conviction to enhance the instant offense to a felony.

Our review of the record, however, reveals an instance of plain error that warrants correction on appeal. The district court convicted and sentenced appellant on three counts for violating each subsection of NRS 484.379(1). In Dossey v. State,[5] we held that convictions for violating each of the three subsections in NRS 484.379(1) are redundant. We explained that "the legislature intended the subsections of this statute to define alternative means of committing a single offense, not separable offenses permitting a conviction of multiple counts based on a single act."[6] Accordingly, the district court should have instructed the jury that it could find appellant guilty of only one count under NRS 484.379(1).[7] We conclude that this error may be corrected on appeal regardless of appellant's failure to object because the error is clear from a casual inspection of the record and it affected appellant's substantial rights.[8] We therefore conclude that two counts of appellant's conviction must be vacated.

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[5]114 Nev. 904, 908, 964 P.2d 782, 784 (1998).

[6]Id. at 909, 964 P.2d at 785.

[7]Id. at 910, 964 P.2d at 785.

[8]See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) ("'An error is "plain" if "the error is so unmistakable that it reveals itself by a casual inspection of the record."'" (quoting Torres v. Farmers Insurance Exchange, 106 Nev. 340, 345 n.2, 793 P.2d 839, 842 (1990) (quoting Williams v. Zellhoefer, 89 Nev. 579, 580, 517 P.2d 789, 789 (1983)))); see also United States v. Olano, 507 U.S. 725, 734 (1993) (explaining standard for plain error review under Fed. R. Crim. P. 52(b), which is identical to NRS 178.602).

For the reasons discussed above, we reject appellant's challenge to the State's use of the 1998 prior conviction for enhancement purposes. We affirm appellant's conviction and sentence on one count alleging a violation of NRS 484.379(1)(a). We vacate his conviction and sentences on the remaining two counts and remand this matter for the district court to enter a corrected judgment of conviction. Accordingly, we

ORDER the judgment of conviction AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Young

_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Brent T. Adams, District Judge
Attorney General
Washoe County District Attorney
John E. Oakes
Washoe County Clerk