IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS DUPUY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 38172

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of driving under the influence in violation of NRS 484.379 and NRS 484.3792(1)(c). The district court sentenced appellant to serve 12 to 30 months in prison and to pay a $2,000.00 fine.

Appellant's sole contention is that the district court erred by using his 1997 DUI conviction in Reno, Nevada for enhancement purposes. Appellant points out that although the 1997 conviction was his second DUI conviction within a seven-year period, he was only sentenced as a first-time offender. On this basis, appellant concludes that the 1997 conviction cannot be used as a "second offense" and, therefore, the instant offense could not be enhanced to a felony.[1] We disagree.

In State v. Crist,[2] Perry v. State,[3] and State v. Smith,[4] we held that a second DUI conviction may not be used to enhance a conviction for a third DUI arrest to a felony

[1]Appellant reserved his right to appellate review of this issue as part of the plea negotiations. See NRS 174.035(3).

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

[3]106 Nev. 436, 794 P.2d 723 (1990).

[4]105 Nev. 293, 774 P.2d 1037 (1989).

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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. As we recently explained in Speer v. State,[5] 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."[6] Accordingly, the rule that we recognized in Crist, Perry, and Smith is not applicable where "there is no plea agreement limiting the use of the prior conviction for enhancement purposes."[7]

Here, the record indicates that appellant pleaded guilty to the 1997 offense, but reserved his right to challenge the constitutional validity of the prior offense alleged in the charging document. At the sentencing hearing, appellant challenged the constitutional validity of the prior offense offered by the State to enhance the 1997 offense to a second offense. At that time, the State was unable to meet its burden of proving that the prior offense was constitutionally valid.[8] Accordingly, the justice court could not enhance the 1997 offense and sentenced appellant pursuant to the guidelines for a first offense. Thus, the 1997 offense was treated as a first offense for purposes of sentencing as a result of the State's failure to meet its burden of proof, not as the result of an agreement to treat the 1997 offense as a

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[5]116 Nev. 677, 5 P.3d 1063 (2000).

[6]Id. at 680, 5 P.3d at 1065.

[7]Id.

[8]We note that the same prior offense, a 1995 DUI conviction in Reno, Nevada, was used to enhance the instant offense to a felony. Appellant has not argued that the 1995 conviction is constitutionally infirm and it appears from the record that the State was able to meet its burden of proof on this issue below.

first offense for all purposes. Because there is nothing in the record to suggest that the State and appellant agreed as part of the plea negotiations that the 1997 offense would be treated as a first offense, we conclude that the rule recognized in Crist, Perry and Smith is not applicable in this case. We therefore conclude that the district court did not err in denying appellant's motion to remand the case to justice court for sentencing as a second offense.

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

ORDER the judgment of conviction AFFIRMED.

_____, J.
Shearing

_____, J.
Rose

_____, J.
Becker

cc: Hon. Jerome M. Polaha, District Judge
Attorney General
Washoe County District Attorney
Larry K. Dunn & Associates
Washoe County Clerk