IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL EDWARD HOULIHAN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 38540

FILED

JAN 03 2002

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of driving under the influence. The district court sentenced appellant Michael Edward Houlihan to serve 12 to 48 months in prison.

Houlihan first contends that the district court abused its discretion by admitting the affidavit of the individual who tested his blood to determine its alcohol content. Houlihan argues that the affidavit was inadmissible hearsay and that the error in admitting the affidavit is not harmless. NRS 50.320 and 50.325 specifically provide that the affidavit of a qualified individual offered to prove the concentration of alcohol in a blood sample is admissible in a felony trial unless the defendant objects in writing to admitting the affidavit.[1] If the defendant objects in writing, "the court shall not admit the affidavit . . . into evidence and the prosecution may cause the person to testify in court to any information contained in the affidavit."[2] Even assuming that Houlihan complied with NRS 50.320(3) in objecting to the use of the affidavit at trial, we conclude that any error was harmless because the individual who tested Houlihan's blood and prepared the affidavit testified at trial.[3] Her testimony was consistent with the information contained in the affidavit and established that Houlihan's blood alcohol content was .30. We therefore conclude that Houlihan is not entitled to relief on this claim.

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[1]NRS 50.320(1)(b), (3); NRS 50.325(1).

[2]NRS 50.320(3).

[3]See NRS 178.598.

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Houlihan next contends that the affidavit does not comply with NRS 484.393 because it does not indicate whether the test was performed on whole blood.[4] Houlihan therefore concludes that the blood test result was inadmissible. We disagree. The affidavit admitted in this case clearly states that the blood sample tested contained whole blood. Moreover, the individual who tested the blood testified at trial that the sample she tested contained whole blood. Accordingly, we conclude that Houlihan's contention is without merit.

Houlihan finally contends that the State acted with conscious indifference to his procedural rights by dismissing the case at preliminary hearing and that, as a result, the State was barred from refiling the charges. Houlihan relies on Hill v. Sheriff[5] and similar cases. We conclude that this contention lacks merit.

Houlihan was arrested on three separate DUI charges in a fairly short period of time. All three cases went to preliminary hearing on the same date. At that time, the parties had negotiated one of the cases, with Houlihan agreeing to enter a guilty plea. However, the State had not yet received the blood test results for the other two cases, including the instant case. As a result, the State asked to dismiss those charges without prejudice to refile them after it received the test results. Houlihan did not object. The State refiled the instant charge approximately one week later.

As an initial matter, we note that Houlihan failed to object below or move to dismiss the complaint or information based on the argument raised on appeal. As a general rule, the failure to object or seek relief in the district court precludes appellate review.[6] There is a narrow exception to this rule: an appellate court may review plain errors that affect the defendant's substantial rights.[7]

Our review of the record reveals that Houlihan cannot demonstrate plain error. NRS 174.085(5)(a) provides that a prosecutor may voluntarily dismiss a complaint "[b]efore a preliminary hearing if the

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[4]NRS 484.393(1)(b) provides that the results of a blood test are not admissible unless, among other things, "[t]he test was performed on whole blood."

[5]85 Nev. 234, 452 P.2d 918 (1969).

[6]See Garner v. State, 78 Nev. 366, 373, 374 P.2d 525, 529 (1962).

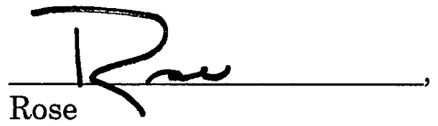
[7]NRS 178.602.

crime with which the defendant is charged is a felony" and that the dismissal is "without prejudice to the right to file another complaint." We recently interpreted the parallel provision in NRS 174.085(5)(b), which allows a prosecutor to voluntarily dismiss a misdemeanor complaint before trial. In Sheriff v. Marcus,[8] we held that because the statute "clearly and unambiguously" permits a prosecutor to voluntarily dismiss a complaint without prejudice and without a showing of good cause, "the requirements announced in the Hill line of cases do not apply to the one dismissal allowed under NRS 174.085(5)."[9] Based on our decision in Marcus and the plain language of NRS 174.085(5), we conclude that the prosecutor was not required to show good cause before dismissing the complaint and that the prosecutor properly refiled the complaint. Moreover, we conclude that Houlihan has not demonstrated that the State used its authority under NRS 174.085(5) to violate any constitutional rights guaranteed to Houlihan.[10]

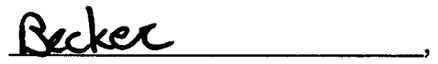
Having considered Houlihan's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Shearing



_____, J.
Rose



_____, J.
Becker

cc: Hon. Robert W. Lane, District Judge
Attorney General/Carson City
Nye County District Attorney/Pahrump
Nye County District Attorney/Tonopah
Robert E. Glennen III
Nye County Clerk

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[8]116 Nev. 188, 995 P.2d 1016 (2000).

[9]Id. at 192-93, 995 P.2d at 1019.

[10]In particular, we note that Houlihan was released from custody upon dismissal of the first complaint.