IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDY PAUL AFONASIEV,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 38622

FILED

JAN 07 2002

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 jury verdict, of one count of driving under the influence, third offense. The district court sentenced appellant Andy Paul Afonasiev to serve a prison term of 28 to 72 months to run consecutive to a sentence in an unrelated case.

Appellant first contends that the district erred in refusing to appoint alternate counsel. Specifically, one week before trial, appellant requested substitute counsel because he believed his court-appointed counsel Harry Kuehn was a "liar" and a "traitor" for providing certified copies of his prior Oregon convictions to the district attorney's office to facilitate a plea agreement that was never effectuated.[1] We conclude that the district court did not abuse its discretion in denying appellant's motion to substitute counsel.

This court has stated that "[t]he decision whether friction between counsel and client justifies appointment of new counsel is entrusted to the sound discretion of the trial court, and should not be disturbed on appeal in the absence of a clear showing of abuse."[2] Moreover, "'[a] defendant is not entitled to reject his court-appointed

[1]The plea agreement was never effectuated because the district attorney would not agree to recommend that appellant receive credit for time appellant spent incarcerated in Oregon on an unrelated charge.

[2]Thomas v. State, 94 Nev. 605, 607-08, 584 P.2d 674, 676 (1978) (citation omitted).

(O)-4892

02-00337

counsel and request substitution of other counsel at public expense absent a showing of adequate cause for such a change.'"[3]

In this case, appellant failed to demonstrate sufficient cause for the appointment of new counsel. Trial counsel did not act unethically in providing the State with copies of appellant's former convictions in facilitation of a plea agreement. Further, a grant of appellant's motion would have likely necessitated a continuance because it was made only a week before trial. We therefore conclude that the district court did not abuse its discretion in denying appellant's motion for the appointment of new counsel.

Appellant next contends that the district court abused its discretion in binding and gagging appellant, and eventually excluding him during the trial. We disagree.

At trial, appellant made several repeated outbursts, expressing both his dissatisfaction with his counsel and his belief that his constitutional rights were being violated. On numerous occasions, the district court asked appellant to sit down and be quiet. Appellant refused. Initially, the district court ordered appellant gagged, but appellant continued to be disruptive. The district court then excused the jury, and warned appellant that it would remove him from the courtroom if he could not behave. Appellant refused. The district court had appellant removed from the courtroom, informing him that: "At any time you desire to come back in and you can behave we will let you back in." The district court also admonished the jury that they were not to hold the appellant's absence or "whatever the defendant said" against him. Eventually, when he agreed to sit quietly, the district court allowed appellant to be present in the courtroom.

NRS 175.387 provides that:

> 1. Whenever a defendant interferes with the orderly course of a trial by his disruptive, disorderly or disrespectful conduct, the court may:
>
> (a) Order the defendant bound and gagged
>
> . . . .

---

[3]Id. at 607, 584 P.2d at 676 (quoting Junior v. State, 91 Nev. 439, 441, 537 P.2d 1204, 1206 (1975)).

(O)-4892

(c) Order the defendant removed from the courtroom and proceed with the trial.

2. No such order or citation shall issue except after the defendant has been fully and fairly informed that his conduct is wrong and intolerable and has been warned of the consequences of continued misconduct.

3. A defendant who has been removed from the courtroom may be returned upon his promise to discontinue such misconduct. If his misconduct continues after his return the court may proceed as provided in subsection 1.

The record reveals that the district court fully complied with the requisites of NRS 175.387 in removing appellant from the courtroom. We further note that appellant's behavior towards the court was clearly disruptive, disorderly and disrespectful, and that the district court's decision to remove appellant from the courtroom was not an abuse of discretion.

Appellant next contends that the jury's verdict was inconsistent justifying reversal of his conviction. Specifically, appellant contends that the verdicts in this case are inconsistent because he was acquitted of having a .10% blood alcohol level within two hours of driving, but found guilty of driving while under the influence of intoxicating alcohol. We conclude that reversal of appellant's conviction is not warranted.

Assuming, without deciding, that the verdicts are inconsistent, this court has held that inconsistent verdicts are permitted in Nevada.[4] This view is consistent with federal law.[5] We decline appellant's invitation to revisit this issue and adopt a different conclusion.

Appellant next contends that there was insufficient evidence in support of his driving under the influence conviction. We disagree.

---

[4]See, e. g., Bollinger v. State, 111 Nev. 1110, 1116-17, 901 P.2d 671, 675-76 (1995); Brinkman v. State, 95 Nev. 220, 224, 592 P.2d 163, 165 (1979).

[5]See United States v. Powell, 469 U.S. 57 (1984) (holding that inconsistent verdicts may be the result of mistake, compromise, or lenity and that reversal is not required simply because the verdicts are inconsistent).

(O)-4892

Eyewitness Vernon Guillian and Officer Sullivan both testified that they observed appellant driving erratically. Officer Sullivan further testified that when he stopped appellant's vehicle, appellant smelled of alcohol and had difficulty walking. Sullivan arrested appellant after he refused to submit to field sobriety tests. A sample of appellant's blood was forcibly taken from him at a medical clinic. Although there was some confusion over the time of the blood draw, Criminalist Randall V. Stone testified that appellant's blood alcohol content was .201, twice the legal limit.

The jury could reasonably infer from the evidence presented that appellant was driving a vehicle while under the influence of intoxicating liquor. It is for the jury "to assess the weight of the evidence and determine the credibility of witnesses," and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[6]

Finally, appellant contends that the district court erred in using one of appellant's prior DUI convictions for enhancement purposes. Specifically, appellant contends that the State failed to prove that the judgment of conviction evidencing that appellant pleaded guilty, while represented by counsel, to "DUII-A/MIS" was a conviction for driving under the influence. We conclude that appellant' s contention lacks merit.

To use a prior misdemeanor conviction for enhancement purposes, the State has the "burden of proving either that the defendant was represented by counsel or validly waived that right, and that the spirit of constitutional principles was respected in the prior misdemeanor proceedings."[7] "[I]f the state produces a record of a judgment of conviction which shows that the defendant was represented by counsel, then it is presumed that the conviction is constitutionally adequate, i.e., that the spirit of constitutional principles was respected."[8] A prior misdemeanor DUI conviction need not be shown by a certified copy of a judgment of conviction, but may be shown by a certified copy of docket sheets and other

---

[6]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[7]Dressler v. State, 107 Nev. 686, 697, 819 P.2d 1288, 1295 (1991).

[8]Davenport v. State, 112 Nev. 475, 478, 915 P.2d 878, 880 (1996).

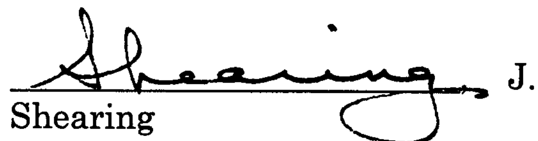
(O)-4892

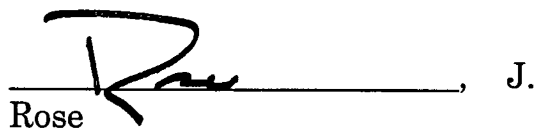
court documents, so long as they show that the defendant was convicted of a misdemeanor DUI in the prior proceedings.[9]

In this case, the State produced a record of a judgment of conviction showing that appellant was represented by counsel in the prior misdemeanor proceedings in Lincoln County, Oregon. Moreover, the reference to "DUII-A/Mis" was adequate to describe the offense of driving under the influence of intoxicants, a class A misdemeanor under Oregon law. The acronym "DUI" is frequently used to describe the offense of driving while under the influence. Accordingly, the district court did not err in enhancing appellant's sentence based upon the Oregon judgment of conviction, which established that appellant had a prior, constitutionally adequate, misdemeanor conviction for driving under the influence.

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

ORDER the judgment of conviction AFFIRMED.


_______________, J.
Shearing


_______________, J.
Rose

_______________, J.
Becker

cc: Hon. John P. Davis, District Judge
Attorney General/Carson City
Harold Kuehn
Nye County District Attorney/Tonopah
Nye County Clerk

[9]See Pettipas v. State, 106 Nev. 377, 379, 794 P.2d 705, 706 (1990).

(O)-4892