

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS JEROME SLEEPER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 39340

FILED

JUN 10 2002

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of felony driving under the influence (DUI). The district court sentenced appellant Dennis Jerome Sleeper to serve a prison term of 14 to 48 months.

Sleeper contends that the district court erred in using one of his prior DUI convictions to enhance his sentence to a felony because it was constitutionally infirm. In particular, Sleeper argues that his conviction in Shasta County, California for misdemeanor DUI was invalid because he was not advised that, by pleading nolo contendere to DUI, he was waiving important constitutional rights. We conclude that Sleeper's contention lacks merit.

To establish the validity of a prior misdemeanor conviction, the State must "affirmatively show either that counsel was present or that the right to counsel was validly waived, and that the spirit of constitutional principles was respected in the prior misdemeanor proceedings."<sup>1</sup> "[I]f the state produces a record of a judgment of conviction which shows that the defendant was represented by counsel, then it is

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<sup>1</sup>Dressler v. State, 107 Nev. 686, 697, 819 P.2d 1288, 1295 (1991).

presumed that the conviction is constitutionally adequate."<sup>2</sup> The burden then shifts to the defendant, represented by counsel, to present evidence to rebut the presumption of constitutionality.<sup>3</sup>

We conclude that Sleeper has failed to rebut the presumption that his prior Shasta County DUI conviction was constitutionally adequate. Prior to sentencing, the State produced a copy of the municipal court records of the Shasta County DUI case. Those records included a signed and notarized waiver form in which Sleeper authorized his attorney to enter Sleeper's nolo contendere plea and receive his sentence in absentia. In executing the form, Sleeper acknowledged that: (1) he had read the "declaration of plea form," (2) he had initialed the plea form indicating that he understood the advisements set forth therein, and (3) his attorney had explained it to him. The records also contained a document titled "DUI Advisement of Rights, Waiver, and Plea Form" that was initialed by Sleeper over twenty times. In initialing the plea form, Sleeper acknowledged each constitutional trial right he was waiving and acknowledged that he understood the nature of the charges against him and the consequences of his plea. Although Sleeper's nolo contendere plea was entered in absentia, and he notes that neither he nor his attorney signed the plea form in the spaces allocated,<sup>4</sup> we conclude that the district

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<sup>2</sup>Davenport v. State, 112 Nev. 475, 478, 915 P.2d 878, 880 (1996).

<sup>3</sup>Id.

<sup>4</sup>Sleeper's attorney also did not sign the certification on the in absentia form that he had advised Sleeper about matters related to the guilty plea. However, Sleeper's attorney did appear on Sleeper's behalf, at Sleeper's entry of plea and sentencing hearing. Sleeper's counsel represented, by affidavit, that he would not have done so unless he was

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court did not err in finding that the spirit of constitutional principles were respected. Sleeper's trial counsel in the Shasta County case, William A. Malloy, submitted an affidavit stating that it is his practice to ensure that his clients are advised of their constitutional rights, pursuant to Boykin v. Alabama,<sup>5</sup> and that he would not have entered a plea on Sleeper's behalf "without feeling satisfied that Mr. Sleeper knew his Boykin rights and had agreed to waive them." Although Malloy did not specifically remember advising Sleeper about his rights, he did recall speaking with the judge on Sleeper's behalf at entry of Sleeper's plea. In accepting Sleeper's plea, the judge signed the plea form, indicating: "that [Sleeper's] plea [was] freely and voluntarily made with an understanding of the consequences thereof, and that there [was] a factual basis for the plea." Further, at the hearing on the validity of the prior conviction, Sleeper failed to present any testimony in support of his claim that he was not advised of his Boykin rights. Accordingly, the district court did not err in using the Shasta County conviction to enhance Sleeper's sentence.

Alternatively, Sleeper argues that the district court should have treated his Shasta County conviction as a first offense DUI because he entered into a plea agreement with the district attorney that it be

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*... continued*

satisfied that Sleeper knew about his constitutional rights. Additionally, Sleeper's counsel represented that, although he did not remember expressly advising Sleeper about his rights since two and a half years had passed, there was a "very high probability" that he advised Sleeper of those rights in a telephone conversation, which the file notes indicate occurred on January 26, 1999.

<sup>5</sup>395 U.S. 238 (1969).

treated as a first offense DUI for all purposes, including future enhancements. We conclude that Sleeper's contention lacks merit.

In State v. Crist,<sup>6</sup> Perry v. State,<sup>7</sup> and State v. Smith,<sup>8</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>9</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>10</sup>

Although Sleeper's Shasta County second offense DUI was charged as a first offense, nothing in the record suggests that the conviction was obtained pursuant to a plea agreement expressly limiting its use for enhancement purposes. Because Sleeper has failed to present any evidence or testimony to substantiate his claim that such an agreement was entered, we conclude that the district court did not err in

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<sup>6</sup>108 Nev. 1058, 843 P.2d 368 (1992).

<sup>7</sup>106 Nev. 436, 794 P.2d 723 (1990).

<sup>8</sup>105 Nev. 293, 774 P.2d 1037 (1989).

<sup>9</sup>Speer v. State, 116 Nev. 677, 680, 5 P.3d 1063, 1065 (2000).


<sup>10</sup>Id.

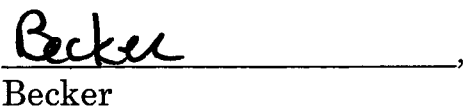
using Sleeper's Shasta County DUI conviction to enhance the instant offense to a felony.

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

ORDER the judgment of conviction AFFIRMED.

 J.  
Shearing

 J.  
Rose

 J.  
Becker

cc: Hon. Connie J. Steinheimer, District Judge  
Lane, Fahrendorf, Vilorio & Oliphant, LLP  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk  
Washoe County Public Defender