IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW BOYD DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40845

FILED

JUN 12 2003

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 guilty plea, of one felony count of driving under the influence (DUI) with two or more prior convictions. The district court sentenced appellant Matthew Boyd Davis to serve a prison term of 12-30 months, and ordered him to pay a fine of $2,000.00. The district court stayed the imposition of Davis' sentence pending the resolution of this appeal.

Davis contends that the district court erred in enhancing his DUI conviction to a felony. Specifically, Davis argues that the three prior Idaho convictions offered for admission by the State were improperly used and insufficient for enhancement purposes. We conclude that Davis' contentions are without merit.

First, Davis challenges the sufficiency of his 1996 DUI arrest and subsequent conviction for enhancement purposes. In that case, Davis was not represented by counsel when he pleaded guilty. Davis now contends that the Idaho court did not properly advise him of his right to an attorney and therefore he never validly waived that right. We disagree.

This court has stated that if a defendant was not represented by counsel in such a proceeding, then "the [S]tate must produce evidence which demonstrates that the defendant validly waived the right to counsel

and that the spirit of constitutional principles was respected."[1] In Davis' case, the State produced a certified copy and transcript of the audio-taped change of plea and sentencing hearing in the Idaho court. After reviewing the transcript, the district court found that Davis was sufficiently advised of his rights prior to the entry of his plea, including his right to an attorney. Further, our review of the transcript reveals that Davis validly waived his right to counsel. Therefore we conclude that Davis' contention was belied by the record and the district court did not err in admitting proof of the conviction in the instant case for enhancement purposes.

Second, Davis challenges the sufficiency of his 1997 and 1998 DUI convictions for enhancement purposes. In both of those cases, Davis was represented by counsel and signed a written guilty plea agreement. In the written plea agreements, Davis authorized counsel to enter guilty pleas on his behalf. Citing primarily to cases from Kentucky for support, Davis contends that the two convictions were constitutionally deficient and should not be used in the instant case for enhancement purposes because he was not orally canvassed on the record by the Idaho courts with regard to the entry of his guilty pleas.[2] We disagree.

To establish the validity of a prior conviction, the State must "affirmatively show . . . that counsel was present . . . and that the spirit of constitutional principles was respected in the prior misdemeanor proceedings."[3] "[I]f the state produces a record of a judgment of conviction

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

[2]See, e.g., Woods v. Com., 793 S.W.2d 809 (Ky. 1990); see also Freese v. State, 116 Nev. 1097, 13 P.3d 442 (2000).

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

which shows that the defendant was represented by counsel, then it is presumed that the conviction is constitutionally adequate."[4] The burden then shifts to the defendant, represented by counsel, to present evidence to rebut the presumption of constitutionality.[5]

As noted above, Davis was represented by counsel in both the 1997 and 1998 cases. Our review of the record on appeal reveals that Davis not only signed written plea agreements, but that he also signed additional court documents indicating that in each case he understood the charges against him, the consequences of his plea, and that his plea was voluntarily entered. Further, Davis has not presented any evidence to rebut the presumption of constitutionality of the two convictions. Therefore, we conclude that the district court did not err in admitting proof of the 1997 and 1998 convictions for enhancement purposes in the instant case.

Finally, Davis contends that the district court should have treated his 1998 conviction as a first-offense DUI, and therefore it was improper to use it to enhance the instant case to a felony. Davis argues that because he entered into a plea agreement in 1998 which stated that the DUI "will be reduced to a misdemeanor and may be treated as a first offense for purposes of mandatory minimum sentencing requirements," that it must also be treated as a first-offense DUI for future enhancement purposes. We disagree.

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[4]Davenport, 112 Nev. at 478, 915 P.2d at 880.

[5]Id.

In State v. Crist,[6] Perry v. State,[7] and State v. Smith,[8] 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."[9] 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."[10] 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.[11]

In Davis' case, the plea agreement in 1998 did not expressly limit the use of the conviction for enhancement purposes or address the issue of possible future enhancement in any way. In fact, Davis has not presented any evidence in support of his argument. Further, the plea

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[6]108 Nev. 1058, 843 P.2d 368 (1992).

[7]106 Nev. 436, 794 P.2d 723 (1990).

[8]105 Nev. 293, 774 P.2d 1037 (1989).

[9]Speer v. State, 116 Nev. 677, 680, 5 P.3d 1063, 1065 (2000).

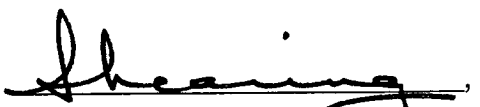
[10]Id.

[11]Id.

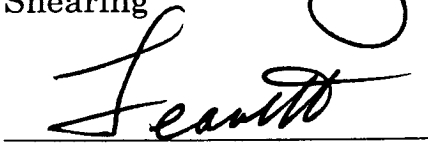
agreement clearly stated that "[t]here are no other agreements as to sentencing except as set forth herein as to treating the misdemeanor [DUI] as first offense for purposes of mandatory minimum sentencing." Therefore, we conclude that the district court did not err in using the 1998 conviction for enhancement purposes.

Having considered Davis' contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Shearing



_____, J.
Leavitt

_____, J.
Becker

cc: Hon. Andrew J. Puccinelli, District Judge
Elko County Public Defender
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk