

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLAUDE WARREN HORNER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40915

FILED

OCT 20 2003

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of third-offense driving under the influence (DUI), a category B felony. The district court sentenced appellant Claude Horner to serve a prison term of 12-30 months and ordered him to pay a fine of \$2,000.00.

Horner contends that the district court erred in using a prior misdemeanor DUI conviction to enhance the instant DUI conviction to a felony because it was constitutionally infirm. In particular, Horner argues that his conviction of May 13, 1996, for misdemeanor DUI was invalid because the Tulare County Municipal Court, in Porterville, California, accepted his guilty plea without advising him about the dangers and disadvantages of self-representation. Horner argues that the documents submitted by the State are insufficient to demonstrate that he knowingly or intelligently waived his right to counsel. We conclude that Horner's contention lacks merit.

In support of his contention, Horner primarily relies upon U.S. v. Akins, where the United States Court of Appeals for the Ninth Circuit held that, pursuant to statute, an element of the crime of possession of a

firearm after being convicted of domestic violence was proof of a prior misdemeanor conviction for domestic violence.<sup>1</sup> Because the prior misdemeanor conviction was an element of the crime, the Akins court held that the State had to prove beyond a reasonable doubt that, prior to pleading guilty, the defendant made a knowing and intelligent waiver of counsel, including that he was advised of the dangers and disadvantages of self-representation.<sup>2</sup> We conclude that Akins is inapplicable to the instant case because Horner's prior misdemeanor DUI conviction was not an element of the charged crime, but instead, was used to enhance his sentence. Further, we do not find Akins persuasive.<sup>3</sup>

To establish the validity of a prior misdemeanor conviction, this court has stated that the prosecution 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>4</sup> With regard to the district court advising a defendant choosing to waive the right to counsel, "[t]he same stringent standard does not apply to guilty pleas in misdemeanor cases" as applies

---

<sup>1</sup>243 F.3d 1199, 1202 (9th Cir. 2001), opinion amended and superseded on denial of rehearing, 276 F.3d 1141 (9th Cir. 2002).

<sup>2</sup>Id. at 1202-03.

<sup>3</sup>See Blanton v. North Las Vegas Mun. Ct., 103 Nev. 623, 748 P.2d 494 (1987), aff'd Blanton v. City of North Las Vegas, 489 U.S. 538 (1989) (noting that this court is not bound by decisions issued by the federal circuit court of appeal).

<sup>4</sup>Dressler v. State, 107 Nev. 686, 697, 819 P.2d 1288, 1295 (1991).

in felony cases.<sup>5</sup> For example, in Koenig v. State, this court affirmed the use of a prior misdemeanor conviction to enhance a sentence imposed in a DUI case where the record of the prior conviction showed only that the appellant signed a form stating that he freely and intelligently waived his right to counsel.<sup>6</sup>

In the instant case, we conclude that the State has met its burden and demonstrated that the spirit of constitutional principles was respected. Horner read, initialed, and signed an advisement of rights, waiver, and plea form indicating, among other things, that he was advised of his rights prior to pleading guilty, including the nature of the charges against him and the consequences of his plea. The waiver of attorney advisement provided, in part: "I understand that I have the right to be represented by an attorney at all stages of this case and that if I cannot afford an attorney, one will be appointed at no cost to me. . . . I give up my right to an attorney and wish to represent myself." The municipal court judge entered an order finding that Horner "knowingly, intelligently, understandingly, and explicitly waived [his] rights. . . . [Horner's] plea and admission are freely and voluntarily made with an understanding of the nature and consequences thereof, and that there is a factual basis for the plea." Accordingly, we conclude that the district court did not err in using the 1996 Tulare County conviction to enhance Horner's sentence in the instant case to a felony.

---

<sup>5</sup>Koenig v. State, 99 Nev. 780, 788-89, 672 P.2d 37, 42-43 (1983).

<sup>6</sup>See id.

Having considered Horner's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Leavitt

  
\_\_\_\_\_, J.  
Maupin

cc: Hon. John P. Davis, District Judge  
Nye County Public Defender  
Attorney General Brian Sandoval/Carson City  
Nye County District Attorney/Tonopah  
Nye County Clerk