IN THE SUPREME COURT OF THE STATE OF NEVADA

LELAND RAY THOMAS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40994

FILED

SEP 19 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 count of felony driving while under the influence of alcohol (DUI). The district court sentenced appellant Leland Ray Thomas to serve a prison term of 12 to 30 months.

Thomas contends that the district court erred in denying his presentence motion to withdraw his guilty plea to felony DUI. Specifically, Thomas contends that his guilty plea to felony DUI is invalid because the district court improperly used his 1996 DUI conviction for enhancement purposes. Thomas argues that the 1996 DUI should not have been used to enhance his misdemeanor DUI to a felony because the 1996 judgment of conviction states that it was a "first offense" DUI.[1] We conclude that Thomas's contention lacks merit.

In State v. Crist,[2] Perry v. State,[3] and State v. Smith,[4] we held that a second DUI conviction may not be used to enhance a conviction for a

[1]Thomas does not dispute that he was also convicted of a first-offense DUI in 1994.

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

third DUI to a felony where the second conviction was obtained pursuant to a plea agreement permitting the defendant to plead guilty to first-offense DUI and expressly limiting the use of the conviction for enhancement purposes. The decisions in those cases, however, "were based solely on the necessity of upholding the integrity of plea bargains and the reasonable expectations of the parties."[5] 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."[6]

Although the judgment of conviction for the 1996 DUI conviction states that Thomas pleaded guilty to a "first offense," nothing in the record suggests that the conviction was obtained pursuant to a plea agreement expressly limiting the use of that conviction for enhancement purposes. To the contrary, the clerk's minute entry of the 1996 plea canvass states:

> Negotiations; [Thomas] will enter a plea of guilty to DUI, 1st offense. However, for enhancement purposes, this will be considered a 2nd DUI. [Thomas] was admonished by [defense counsel] that if he is arrested for DUI again within 7 years, he will be looking at felony DUI and 1-6 years in prison.

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[3]106 Nev. 436, 794 P.2d 723 (1990).

[4]105 Nev. 293, 774 P.2d 1037 (1989).

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

[6]Id.

Although Thomas acknowledges the clerk's minute entry, Thomas argues that the "first offense" language in the written judgment should prevail over the clerk's minutes because the signed written judgment is the final judgment of the district court.[7] Alternatively, Thomas argues that the written judgment is an ambiguous contract that should be construed against the drafter.[8] We reject Thomas's arguments. The 1996 written judgment of conviction neither conflicts with the clerk's minute entry nor is ambiguous. The "first offense" language in the 1996 judgment of conviction refers to the offense for which Thomas was convicted and sentenced. Notably, the 1996 judgment of conviction does not state that Thomas entered a plea agreement limiting the use of the conviction for enhancement purposes. Moreover, Thomas has failed to present any other evidence that he entered a plea agreement limiting the use of the 1996 DUI conviction for enhancement purposes. Accordingly, the district court did not err in using the 1996 DUI conviction to enhance the instant offense to a felony. We therefore conclude that the district

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[7]In support of his argument, Thomas relies on two civil cases: Bowers v. Edwards, 79 Nev. 384, 385 P.2d 783 (1963) and F.C. Mortimer v. P.S.S. & L. Co., 62 Nev. 142, 141 P.2d 552 (1943). Those cases hold that where there is a conflict between the written judgment and the clerk's minute entry of court proceedings, the written judgment controls.

[8]Thomas again relies on this court's civil case law, namely, American Fire v. City of North Las Vegas, 109 Nev. 357, 849 P.2d 352 (1993) and Williams v. Walden, 108 Nev. 466, 836 P.2d 614 (1992).

court did not abuse its discretion in denying Thomas's presentence motion to withdraw his guilty plea to felony DUI.[9]

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

ORDER the judgment of conviction AFFIRMED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. Robert W. Lane, District Judge
James L. Buchanan II
Attorney General Brian Sandoval/Carson City
Nye County District Attorney/Pahrump
Nye County District Attorney/Tonopah
Nye County Clerk

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[9]See NRS 176.165; State v. District Court, 85 Nev. 381, 385, 455 P.2d 923, 926 (1969) (The district court may grant a presentence motion to withdraw a guilty plea, in its discretion, for any substantial reason that seems fair and just).