

IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN DANIEL BAKER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42381

**FILED**

APR 07 2004

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 guilty plea, of one count of possession of a controlled substance. The district court sentenced appellant Kevin Daniel Baker to serve a prison term of 12 to 32 months to run consecutively to the sentence imposed in an unrelated case.

Relying on Lewis v. State,<sup>1</sup> Baker contends that he was entitled to probation because the State failed to allege in the charging document that he had previously had his probation revoked in an unrelated case.<sup>2</sup> More specifically, Baker argues that he should have received formal notice in the charging document that probation was discretionary rather than mandatory, pursuant to NRS 176A.100,<sup>3</sup>

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<sup>1</sup>109 Nev. 1013, 862 P.2d 1194 (1993).

<sup>2</sup>To the extent that Baker argues that his guilty plea is invalid because he pleaded guilty believing he would receive probation, we note that Baker's challenge to the validity of the guilty plea should be raised in the district court in the first instance. See Bryant v. State, 102 Nev. 268, 721 P.2d 364 (1986).

<sup>3</sup>NRS 176A.100(1)(b) provides, in part, that probation is discretionary, rather than mandatory, where at the time the crime was committed: (1) the defendant either was on probation or had a grant of  
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because discretionary probation is a sentencing enhancement under NRS 453.336. We conclude that Baker's contention lacks merit.

In Lewis, this court held that, where the State seeks a sentencing enhancement for a simple possession conviction under NRS 453.336(2), the State must give the defendant formal notice by alleging the prior convictions in the charging document.<sup>4</sup> "A sentencing enhancement is . . . an additional penalty for the primary offense."<sup>5</sup>

Unlike the defendant in Lewis who was sentenced for third-offense possession of a controlled substance, Baker did not receive a sentencing enhancement under NRS 453.336. Baker pleaded guilty to first-offense possession of a controlled substance, a category E felony with a sentencing range of 1 to 4 years in prison.<sup>6</sup> Although in Baker's case, probation was discretionary because one of the exceptions set forth in NRS 176A.100 applied, we disagree that the application of that statute is equivalent to a sentencing enhancement. NRS 176A.100 does not increase the maximum potential sentence for the simple possession offense, but instead merely sets forth guidelines for the district court with regard to the suspension of the execution of the sentence imposed. Accordingly, we conclude that the State is not required to allege circumstances that would

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probation revoked for a prior felony conviction; or (2) the defendant had two prior felony convictions.

<sup>4</sup>Lewis, 109 Nev. at 1014-15, 862 P.2d at 1195.

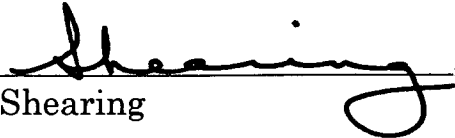
<sup>5</sup>See Domingues v. State, 112 Nev. 683, 692, 917 P.2d 1364, 1371 (1996); see also Apprendi v. New Jersey, 530 U.S. 466, 476 (2000).

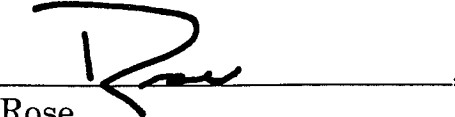
<sup>6</sup>See NRS 453.336(2)(a); NRS 193.130(2)(e).

render probation discretionary in the charging document. Moreover, because it is undisputed that Baker had previously had his probation revoked in another case, the district court acted within its discretion in refusing to suspend execution of the sentence imposed.

Having considered Baker's contention and concluded that it lacks merit, we

ORDER the judgment of conviction AFFIRMED.

 C.J.  
Shearing

 J.  
Rose

 J.  
Maupin

cc: Hon. Steven P. Elliott, District Judge  
Washoe County Public Defender  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk