

IN THE SUPREME COURT OF THE STATE OF NEVADA

NORMAN TRACY ELLSBURY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42772

FILED

JUL 23 2004

ORDER OF AFFIRMANCE

JANETTE L. BLOOM
CLERK OF SUPREME COURT
BY *J. Roberts*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of felony driving while under the influence (DUI). Second Judicial District Court, Washoe County; Janet J. Berry, Judge. The district court sentenced appellant Norman Tracy Ellsbury to serve a prison term of 15 to 48 months.

Ellsbury contends that the district court erred in denying his motion to suppress his prior misdemeanor DUI conviction from South Dakota because the record contains an ambiguous waiver of the right to counsel. Specifically, Ellsbury contends that the waiver of the right to counsel is equivocal because: (1) the judge's question regarding the waiver of the right to counsel was compound; (2) Ellsbury only nodded affirmatively, and did not expressly state that he wanted to proceed without an attorney; and (3) Ellsbury later made several references to his attorney. We conclude that Ellsbury'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.”¹ In cases where the defendant was not represented by counsel, the State has the burden to present evidence showing that the defendant validly waived counsel.² If the State meets its evidentiary burden by proffering court records showing a waiver of the right to counsel, the evidentiary burden then shifts to the defendant to overcome the presumption of regularity given to the court records.³ In order to rebut the presumption, a defendant must present some evidence that the waiver of the right to counsel was invalid or that the spirit of constitutional principles was otherwise violated.⁴ The sentencing court may not imply a constitutional deficiency from a silent record.⁵

In this case, the State met its evidentiary burden by proffering court records of the South Dakota conviction, including a transcript of the plea canvass in that case. At the plea canvass, the magistrate judge thoroughly advised Ellsbury of his constitutional rights, including the right to counsel, and Ellsbury acknowledged that he understood those rights. Additionally, the magistrate judge asked, "Do you want to plead guilty to [DUI]? Do you want to give up your right to a lawyer?" and Ellsbury nodded affirmatively. Thereafter, the magistrate judge accepted Ellsbury's guilty plea finding that it was "voluntarily, knowingly and intelligently entered."

¹See Dressler v. State, 107 Nev. 686, 697, 819 P.2d 1288, 1295 (1991).

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

³Id.

⁴Id.


⁵Dressler, 107 Nev. at 693, 819 P.2d at 1292.

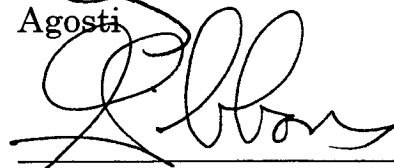
Although Ellsbury notes that, when inquiring about the waiver of the right to counsel, the magistrate asked Ellsbury a compound question and Ellsbury later asked the judge whether he had spoken with his attorney, the transcripts of the plea canvass indicate that Ellsbury's waiver of the right to counsel in the South Dakota case was consistent and unequivocal.⁶ Moreover, in the proceedings below, Ellsbury failed to present any evidence of constitutional deficiency to overcome the presumption of regularity attaching to the court records. Therefore, the district court's finding that Ellsbury's decision to waive his right to counsel was knowing, voluntary and intelligent is supported by substantial evidence.

Having considered Ellsbury's contention and concluded that the district court did not err in denying the motion to suppress, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

⁶Cf. Bonds v. State, 105 Nev. 827, 784 P.2d 1 (1989) (holding that the district court erred in using a prior DUI conviction for enhancement purposes because the court records contained two contradictory statements about the waiver of the right to counsel).

cc: Hon. Janet J. Berry, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk