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## Sindelar v. State, 132 Nev. Adv. Op. 68 (Sept. 29, 2016)

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Criminal Appeal; Fast Track; Direct

**Summary**

In Nevada, if a person is convicted three times within seven years for driving under the influence (DUI), the third conviction is a category B felony.<sup>2</sup> The Court held that a felony DUI conviction in Utah, which occurs upon a person's third DUI conviction within ten years, can be included as a past conviction in a later DUI offense in Nevada to make the offense a category B felony under NRS 484.410 because the conduct required to violate the Utah law is "the same or similar" as that required to violate the Nevada law.

**Background**

Stella Sindelar was cited for DUI in Utah on December 28, 2002. She had at least two prior DUI convictions within the previous ten years, and so the offense was a felony under Utah law. She pled guilty to the felony offense on May 10, 2004 and spent 62 days in jail. Sindelar was subsequently arrested under suspicion of DUI in Ely, Nevada in March 2013. The State charged Sindelar with a felony DUI because of the 2004 Utah conviction and the district court determined that this was acceptable because the violation involved "the same or similar conduct" as Nevada's felony DUI statute. Sindelar was convicted and sentenced to 30 to 75 months in prison. On appeal, Sindelar argues that: 1) the 2004 conviction would have been a misdemeanor if it had occurred in Nevada rather than Utah and, therefore the instant offense should not have been a felony; and 2) the State committed prosecutorial misconduct.

**Discussion**

*Utah's DUI laws contain a longer recidivism window but punish the same or similar conduct as Nevada's DUI laws.*

Sindelar's felony DUI conviction will be sustained if the Utah statute punishes the same or similar conduct described by NRS 484C.110. The conduct may merely be the same "kind or species" and does not necessarily need to be exactly the same.<sup>3</sup> The Utah statute prohibits "driving while incapable of safely operating a vehicle due to alcohol consumption."<sup>4</sup> Nevada prohibits "driving under the influence of intoxicating liquor."<sup>5</sup> Both states prohibit driving with a blood alcohol concentration of 0.08 or higher and require a third offense within a certain statutory window to be a felony. The only difference is that Nevada's window is seven years and Utah's is 10 years.<sup>6</sup> This difference does not change the underlying conduct and, therefore, the Nevada case was correctly adjudicated as a felony.

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<sup>1</sup> By Skyler Sullivan.

<sup>2</sup> NRS 484C.400(1)(c).

<sup>3</sup> *Blume v. State*, 915 P.2d 282, 284 (Nev. 1996).

<sup>4</sup> UTAH CODE ANN. § 41-6-44(2)(a).

<sup>5</sup> NRS 484C.110(1).

<sup>6</sup> NRS 484C.400(1)(c); UTAH CODE ANN. § 41-6-44(6)(a)(i).

*Sindelar's prosecutorial misconduct claims are without merit.*

Sindelar did not object to any of the alleged instances of misconduct at trial. Additionally, the State's objection to the defense's line of questioning about "liberty interests" to one of the prosecution's witnesses was not improper. The jury is not to consider the "liberty interests," just whether the State has proven the crime occurred. Further, the State's conduct during closing arguments was not improper because its choice of words was not plainly prejudicial. Finally, the State was within its right to refocus its closing to whether the defendant met the element of the offense and whether the State proved its case beyond a reasonable doubt.

### **Conclusion**

Sindelar's judgment of conviction is affirmed because: 1) the instant offense was properly adjudicated as a felony; and 2) Sindelar did not demonstrate plain error in the prosecution's conduct affecting her substantial rights.