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## Summary of Whisler v. State, 121 Nev. Adv. Op. 40

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## ***Whisler v. State*, 121 Nev. Adv. Op. 40 (July 28, 2005)<sup>1</sup>**

### **CRIMINAL LAW & PROCEDURE – INVOLUNTARY INTOXICATION – ADMISSION OF PRIOR CONVICTIONS**

#### **Summary**

The defendant, Douglas Whisler, appealed his conviction for driving while under the influence of controlled substances or chemicals.

#### **Disposition/Outcome**

The Nevada Supreme Court upheld the conviction, finding that the district court properly instructed the jury that, to convict Whisler, they did not have to find that he knowingly became intoxicated, but only that he was aware of his impairment when he chose to drive his vehicle. The Court further determined that admission of Whisler's previous DUI convictions was proper because the danger of unfair prejudice did not outweigh the probative value of the convictions.

#### **Factual and Procedural History**

Several witnesses observed Whisler clumsily entering his vehicle and then weaving in and out of his lane of travel while driving. A police officer who subsequently responded to Whisler's residence arrested Whisler for driving while under the influence of a controlled substance or chemical. Blood tests revealed that Whisler was under the influence of carisoprodol and other depressants, which he had obtained in Mexico for pain resulting from a chronic spine condition.

At trial, Whisler admitted to driving while impaired, but defended on the grounds that he was involuntary intoxicated by medication. He testified preemptively of a previous conviction on a felony DUI charge. The jury convicted Whisler of driving while under the influence of a controlled substance or chemical. Whisler appealed the conviction, arguing:

- (1) that the district judge erred by admitting evidence of his prior conviction because that conviction involved voluntary impairment, while the current charge involved involuntary impairment;
- (2) that the district court erroneously refused his proffered jury instruction; and
- (3) that the district court misinterpreted NRS 484.379.<sup>2</sup>

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<sup>1</sup> By Jared R. Gibb

<sup>2</sup> NEV. REV. STAT. 484.379 provides, in pertinent part:

It is unlawful for any person who:

- (a) Is under the influence of a controlled substance;
- (b) Is under the combined influence of intoxicating liquor and a controlled substance; or
- (c) Inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access. The fact that any person charged with a violation of this

## **Discussion**

### **I. Admission of Prior Convictions**

Under *Pineda v. State*,<sup>3</sup> a party can appeal the admissibility of his or her prior convictions even when that party was the one who sought to admit them at trial. As a threshold matter, the Nevada Supreme Court expressly upheld and followed *Pineda* and allowed Whisler to appeal the issue of the admissibility of his prior convictions.

Under NRS 48.035(1),<sup>4</sup> relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. In this case, the Court determined that evidence of Whisler's prior DUI convictions was relevant to show his awareness of impairment, the absence of mistake concerning his level of impairment, and to evaluate his credibility. The district court's instructions that the evidence be considered only for these reasons and not as evidence of Whisler's guilt of the crime charged led the Court to decide that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

### **II. Jury Instruction**

Pursuant to NRS 484.379, it is unlawful for a person to operate a vehicle on a highway while under the influence of a controlled substance or chemical that renders the person incapable of safe driving.<sup>5</sup> Whisler argued that the State must prove, as an element of the crime, that he "willfully" became intoxicated. Accordingly, Whisler argued that the jury instruction was improper.<sup>6</sup> The Court, however, rejected this contention, ruling that willful intoxication is not an element of the offense under NRS 484.379, but that the State must only prove that the defendant willfully *drove a vehicle* while intoxicated. Thus, the Court held the jury instruction was proper.

Further, the Court ruled that, although carisoprodol is not considered to be a controlled substance in Nevada, it is a chemical, and thus operating a vehicle while under its affects constitutes a violation of NRS 484.379.

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subsection is or has been entitled to use that drug under the laws of this state is not a defense against any charge of violating this subsection.

<sup>3</sup>120 Nev. Adv. Op. 24, 88 P.3d 827, 831 (2004).

<sup>4</sup>NEV. REV. STAT. 48.035(1) provides: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."

<sup>5</sup>NEV. REV. STAT. 484.379 (2004).

<sup>6</sup>The district court instructed the jury as follows:

If one should become intoxicated as a result of an innocent mistake of fact, but after becoming impaired was still sufficiently in possession of his faculties to know what he was doing and to understand the character of his acts, and with such knowledge and understanding should voluntarily drive a motor vehicle, the involuntariness of the intoxication would not excuse him because the prohibited act (driving) was done voluntarily.

## **Conclusion**

The district court did not err in admitting evidence of Whisler's prior DUI convictions because the probative value of evidence was not substantially outweighed by the danger of prejudice to Whisler. Further, the jury instruction at trial was appropriate because under NRS 484.379, the State must not prove that a person was willfully intoxicated, but only that the person willfully drove a vehicle while intoxicated.