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State of Nevada v. Second Judicial District Court, 134 Nev. Adv. Op. 51 (Jul. 19, 2018)

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CRIMINAL LAW: PLEA BARGAINS

Summary

The Court determined that when the State allows a defendant to plead guilty to a first offense domestic battery for a second offense of domestic battery, the State must treat the second conviction as a first conviction for enhancement purposes unless the defendant receives appropriate clarification and warning of the State's intention to use the second conviction as a second conviction for future enhancement purposes.

Background

Under NRS 200.485(1), a second domestic battery conviction within seven years is a misdemeanor (like a first domestic battery offense), but it carries an enhanced fine, minimum jail sentence, and minimum community service requirement. A third domestic battery conviction within seven years may be treated as a category C felony.

John Kephart entered a plea of no contest to a domestic battery charge in May 2010. Kephart also entered a guilty plea to a second domestic battery charge in July 2010. Kephart represented himself in his second domestic battery case. While Kephart originally pled not guilty, Kephart changed his plea to guilty after the State amended their complaint so that it read as a charge for a first domestic battery offense rather than a second domestic battery offense. After pleading guilty, Kephart signed an admonishment of rights stating:

I understand that the State will use this conviction and any other prior conviction from this or any other state which prohibits the same or similar conduct, to enhance the penalty for any subsequent offense.

Kephart's third and current conviction for domestic battery came in January 2017. A jury found him guilty of domestic battery. At sentencing, the State sought felony treatment under NRS 200.485(1)(c) for enhanced penalties for multiple domestic batteries. Kephart objected, claiming that the conditions of his plea in his second case led him to believe that his next offense (the current offense) would be treated as his second offense for all purposes. While the district court did not find that the State had affirmatively agreed not to use Kephart's second conviction for future sentence enhancement, it did find that the State's notice to Kephart that the July 2010 offense could be used in future sentence enhancement was inadequate. For that reason, the district court declined to consider Kephart's July 2010 conviction in sentencing him. The district court vacated the sentencing hearing so that the State could appeal. The State filed a writ of mandamus.

¹ Ron Evans.

Discussion

The Court first noted that the reason for the enhanced penalties under NRS 200.485 was to discourage recidivism. The Court further discussed how the domestic battery statutes were modeled on the state's DUI enhancement statutes.

The Court first examined NRS 200.485 under a plain text reading. It noted that NRS 200.485 provided that:

An offense that occurs within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section when evidenced by a conviction, without regard to the sequence of the offenses and convictions.²

After considering the statute, the Court determined that the plain language of NRS 200.485 clearly undercut the district court's decision. It noted that the only relevant question was how many prior convictions Kephart had for domestic battery within the past seven years. Whether the plea claimed it was a first offense or not was largely irrelevant because the statute specifically states it only matters how many prior convictions the defendant had within the past seven years.

However, the Court noted that this interpretation was complicated by the developed case-law surrounding the DUI enhancement statutes on which NRS 200.485 was modeled. The Court cited *State v. Smith* for the notion that unless the defendant is told otherwise, it is reasonable for the defendant to conclude that in being allowed to plead to a second offense as a first offense, the State is willing to treat the second offense as a first offense for enhancement purposes.³ The Court therefore noted that when a defendant pleads a second offense DUI down to a first offense, that appropriate clarification and warning is required if the State intends to use the second offense as a second offense for enhancement purposes.

The Court also took special note of the case *Speer v. State*. Unlike in *Smith*, where the plea the defendant accepted was silent as to future enhancement consequences of the plea, in *Speer*, the plea specifically articulated that "the parties agree that the conviction would not be treated as a 'first offense' for all purposes and that Speer's next offense could be treated as a felony."⁴ The court in *Speer* then determined that whether a plea that treated a second DUI offense as a first DUI offense could be used for enhancement purposes, was based on whether the State had articulated whether it retained the right to use the second conviction for enhancement purposes.

The Court applied this logic to the present case and found that Kephart had specifically acknowledged that the State retained the ability to use his second conviction for potential future enhancement purposes. The Court further noted that Kephart was informed of the escalating penalties for first, second, and third domestic battery offenses. The Court reasoned that because Kephart had specifically acknowledged those penalties, he could not claim that he reasonably relied on the second conviction not being used for future enhancement purposes. The Court noted

² *Id.* at 7 (Jul. 19, 2018)

³ *State v. Smith*, 105 Nev.293, 299 774 P.2d 1037, 1041 (1989).

⁴ *Speer v. State*, 166 Nev. 677, 678, 5 P.3d 1063, 1064 (2000).

that while Kephart had testified that he understood the plea agreement to mean his second conviction would be treated as a first offense, that belief seemed to be entirely subjective, and not based on any representations from either the State or the Court. Therefore, his belief was unreasonable. The Court further claimed that Kephart still retained a benefit from the negotiation even if the second conviction could be used for enhancement purposes. A first offense domestic battery carries with it a lower penalty than a second offense domestic battery, and thus the Kephart's benefit he derived from the plea was in the form of a less penalizing sentence for his second conviction. The Court thus granted the State's request for extraordinary relief and directed the district court to admit Kephart's July 2010 domestic battery conviction to enhance his third conviction to a felony.

Conclusion

The Court determined that where the State specifically reserved the right to use the second domestic battery offense for future sentence enhancement purposes, it was unreasonable for the defendant to assume the second conviction would be treated as a first offense. Therefore, the Court granted the State's request to admit the defendant's second conviction to enhance his third conviction to a felony.