IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL WAYNE KAPETAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54944

FILED

JUN 09 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of felony DUI. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge. Appellant Daniel Wayne Kapetan raises three issues on appeal, which he properly preserved pursuant to NRS 174.035(3).

First, Kapetan argues that the district court erred in denying his pretrial motion to exclude evidence of a blood test because there was insufficient evidence of a proper chain of custody of the sample. We disagree. Because doubts about possible tampering or substitution are weight-of-the-evidence issues properly raised at trial, see Hughes v. State, 116 Nev. 975, 981, 12 P.3d 948, 952 (2000), the district court did not abuse its discretion in failing to exclude the sample, see Franko v. State, 94 Nev. 610, 613, 584 P.2d 678, 679 (1978).

Second, Kapetan contends that the 2005 amendment to NRS 484.3792(1)(c) (now codified as NRS 484C.400(1)(c)), as applied to this case, is an impermissible retroactive application of a new law and thereby violates his due process rights. At the time of two of Kapetan's prior felony DUI convictions in 1997, the law provided that, for the purposes of

enhancement, the convictions would be considered for seven years. In 2005, the law was amended so that if an individual had previously been convicted of felony DUI and was convicted of a subsequent DUI, he was guilty of a category B felony regardless of how much time had passed since the last felony conviction. See 2005 Nev. Stat. Spec. Sess., ch. 6, § 15, at 103. We agree with the district court that the change in the law "did not violate due process as Kapetan was put on notice that the seven year period had been abrogated prior to being charged with the current DUI." See Dixon v. State, 103 Nev. 272, 274, 737 P.2d 1162, 1164 (1987); see also State v. Nickerson, 973 P.2d 758, 763 (Idaho Ct. App. 1999).

Third, Kapetan argues that convicting him of a felony in the instant case amounts to a violation of the 1997 plea agreement. As nothing in the record indicates that Kapetan was promised limited enhancement consideration of the felonies to which he pleaded in 1997, we reject this argument. Compare State v. Smith, 105 Nev. 293, 298-99, 774 P.2d 1037, 1041 (1989) (holding that a second DUI conviction could not be used to enhance a subsequent DUI conviction to a felony when the second conviction was obtained pursuant to a guilty plea agreement that specifically permitted the defendant to plead guilty to a first-offense DUI and limited the use of that conviction for enhancement purposes), with Speer v. State, 116 Nev. 677, 680, 5 P.3d 1063, 1065 (2000) (holding that the rule recognized in Smith is not applicable where the plea agreement does not limit the use of the prior conviction for enhancement purposes).[1]

[1]We also reject Kapetan's conclusory argument that the 2005 law is ambiguous.

Having considered Kapetan's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Andrew J. Puccinelli, District Judge
Lockie & Macfarlan, Ltd.
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk