

IN THE SUPREME COURT OF THE STATE OF NEVADA

SHIRA MONET GARFINKEL,  
Petitioner,

vs.

THE SECOND JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
WASHOE; AND THE HONORABLE  
ROBERT H. PERRY, DISTRICT JUDGE,  
Respondents,  
and  
THE STATE OF NEVADA,  
Real Party in Interest.

No. 57028

**FILED**

**DEC 13 2010**

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

ORDER DENYING PETITION

This original petition for a writ of certiorari or mandamus challenges an order of the district court affirming on appeal a judgment of conviction entered in justice court against petitioner Shira Garfinkel. Garfinkel was convicted of, among other crimes, violating NRS 484.379(3)(h) (now codified as 484C.110(3)(h)). That section criminalizes driving a motor vehicle with a marijuana metabolite content greater than 5 nanograms per milliliter of blood. At trial and on appeal to the district court, Garfinkel contended that NRS 484.379(3)(h) is unconstitutional and renews that contention in this petition, which we now consider. See NRS 34.020(3); City of Reno v. District Court, 83 Nev. 201, 202, 427 P.2d 4, 5 (1967) (authorizing review where district court passed on constitutionality of statute).

First, Garfinkel argues that NRS 484.379(3)(h) violates the Equal Protection and Due Process clauses of the Fourteenth Amendment

because the State has no rational basis for promulgating a law that proscribes conduct that may not impair the ability to drive and is not illegal in California. In Williams v. State, 118 Nev. 536, 50 P.3d 1116 (2002), we upheld NRS 484.379(3) against a similar constitutional attack, and we see no need to revisit that decision here. In that case, we noted that the Legislature, in constructing this per se statute, considered and rejected the arguments of those who claimed that the law “lacked a direct correlation between the prohibited drugs in a driver’s system and impairment.” Id. at 543, 50 P.3d at 1120-21. We also described the “pertinent” sections of NRS 484.379(3) at issue in Williams to be those that forbid driving with a prohibited amount of both marijuana and marijuana metabolite in the blood. Id. at 540-41, 50 P.3d at 1119; see also id. at 547, 50 P.3d at 1123 (“The substance at issue in the present case is marijuana and its metabolite.”). For these reasons, Garfinkel’s attempts to distinguish her case from Williams by arguing that in Williams this court grappled only with the prohibition on active marijuana and did not meaningfully analyze the constitutional implications of the prohibition of driving while carrying marijuana metabolite in the blood are unavailing. Further, in Williams we also rejected Garfinkel’s argument that NRS 484.379(3) was constitutionally infirm because it failed to differentiate between legal and illegal consumption of marijuana. Id. at 544, 50 P.3d at 1121.

Second, Garfinkel claims that NRS 484.379(3)(h) is void for vagueness. In Williams, we concluded that NRS 484.379(3) was not unconstitutionally vague as it “provides adequate notice that it is unlawful to drive with clearly defined levels of marijuana or marijuana metabolite

in the bloodstream," id. at 547, 50 P.3d at 1123, and we sustain that conclusion here.

Third, Garfinkel asserts that NRS 484.379(3) violates the Eighth Amendment prohibition on cruel and unusual punishment because it interferes with her right to travel. Specifically, she claims that, as a legal user of marijuana in California, Nevada is unconstitutionally infringing on her right to transit through the state by criminalizing driving with prohibited amounts of marijuana metabolite. NRS 484.379(3)(h) does not enjoin Garfinkel's transit through the State, it criminalizes her driving a motor vehicle through the State with prohibited substances in her blood or urine. As driving is a privilege, not a constitutionally-protected right, Zamarripa v. District Court, 103 Nev. 638, 642, 747 P.2d 1386, 1388 (1987), we conclude that NRS 484.379(3) is constitutional on this basis as well.

Accordingly, we

ORDER the petition DENIED.

Cherry, J.  
Cherry

Saltta, J.  
Saltta

Gibbons, J.  
Gibbons

cc: Hon. Robert H. Perry, District Judge  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe County Public Defender  
Washoe District Court Clerk