IN THE SUPREME COURT OF THE STATE OF NEVADA

JAY JIM,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57942

FILED

SEP 14 2011

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 possession of a controlled substance. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

Appellant Jay Jim contends that the district court erred at sentencing by not granting him probation because probation was mandatory pursuant to this court's interpretation of NRS 176A.100(1)(b) in Roberts v. State, 120 Nev. 300, 89 P.3d 998 (2004). Specifically, Jim argues that probation is only discretionary where a defendant has already sustained previous felony convictions at the time of the commission of the instant crime. Because one of Jim's prior felony convictions was not entered until after the commission of the instant offense, he contends that the district court was required to suspend his sentence and grant him probation. We disagree.

NRS 176A.100(1)(b)(4) provides that where, as here, a defendant is convicted of a category E felony, see NRS 453.336(2)(a), the district court must suspend the execution of the sentence and grant probation unless it is established at the time of sentencing that the defendant had previously been convicted of two felonies. In Roberts, this court stated that, pursuant to NRS 176A.100(1)(b), probation is

discretionary "where at sentencing it is established that at the time of the commission of the crime, the defendant . . . had two prior felony convictions." Roberts, 120 Nev. at 301, 89 P.3d at 999 (emphasis added). We agree with the State that this language misstates the statute because NRS 176A.100(1)(b) only requires that the prior convictions be established at the time of sentencing and does not require that the prior convictions already be sustained at the time of the commission of the instant offense. We conclude, however, that the above-cited language in Roberts is mere dicta that does not constitute binding precedent, see Argentena Consol. Mining Co. v. Jolley Urga, 125 Nev. 527, 536, 216 P.3d 779, 785 (2009), and the plain language of the statute is clear. Therefore, the district court did not err by concluding that because Jim had suffered two prior felony convictions at the time of sentencing, a grant of probation was discretionary.[1] Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.
Douglas

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

[1]Because the plain language of the statute is clear, we need not look at the legislative history of NRS 176A.100(1)(b). See, e.g., Sheriff v. Burcham, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008). Nevertheless, that history supports our conclusion that the prior convictions need not have been entered at the time of the commission of the crime to render a grant of probation discretionary. See, e.g., Hearing on A.B. 95 Before the Assembly Judiciary Comm., 72d Leg. (Nev., February 24, 2003).

cc: Hon. J. Michael Memeo, District Judge
Elko County Public Defender
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk