

STATE OF IDAHO)
County of KOOTENAI)^{ss}

FILED _____

AT _____ O'Clock _____ M
CLERK OF THE DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

STATE OF IDAHO,)
)
Plaintiff,)
)
vs.)
)
RYAN PATRICK HOFFMAN,)
)
Defendant.)
_____)

Case No. **CRF 2007 3398**

**ORDER DENYING MOTION TO
DISMISS**

I. INTRODUCTION AND BACKGROUND.

On February 26, 2007, defendant Ryan Patrick Hoffman filed a "Motion to Dismiss Part II of the Information". Oral argument was held May 1, 2007. Hoffman's motion contained a brief. The State of Idaho, represented by the Kootenai County Prosecuting Attorney, failed to file any response brief. Accordingly, the plaintiff was not allowed to argue at the May 1, 2007, oral argument.

In the Information, Hoffman is charged with, among other things, Operating a Motor Vehicle while Under the Influence of Alcohol on February 13, 2007, a violation of I.C. § 18-8004, § 18-8005. Part II of the Information alleges that Hoffman has previously been convicted of Driving Under the Influence on two prior occasions within the ten years prior to February 13, 2007, to wit: an April 29, 1999, conviction in CRM 97-10053 and December 13, 2004, conviction in CRM 04 9721. Part II of the Information, if proved, results in a felony as it would be Hoffman's third conviction within ten years. Idaho Code § 18-8005(5).

Prior to July 1, 2006, an enhanced felony charge of Driving Under the Influence

required that the two prior DUI convictions be within five (5) years of the date alleged for the new DUI charge. Idaho Code § 18-8005(5). Effective July 1, 2006, the Idaho Legislature increased the enhancement period from five (5) years to ten (10) years. *Id.* Hoffman claims he should now be charged with only a second offense DUI (a misdemeanor), based on the 2004 DUI conviction. Hoffman argues that his 1999 DUI conviction, under the old law with a five-year “look back” on the enhancement provision for DUI, the statute of limitations passed on April 29, 2004 (five years after his April 29, 1999, DUI conviction). Hoffman claims this ten-year “look back” is a “new statute of limitations” violating the prohibition against *ex post facto* laws. Motion to Dismiss, p. 3.

II. ANALYSIS.

Hoffman claims that: “An initial reading of the Idaho case *State v. Nickerson*, 132 Idaho 406, 973 P.2d 758 (App. 1999) seems to answer the issue against the Defendant’s position, but it does not.” Motion to Dismiss, p. 3. Nickerson had a prior felony DUI in 1991. Nickerson argued that since the legislature in 1992 changed I.C. 18-8005(7) to make it a felony DUI to have another DUI within ten (10) years of the prior DUI, the change violated the prohibition against *ex post facto* laws found in Article 1, § 10 of the United States Constitution and in Article 1, § 16 of the Idaho constitution, when applied to his circumstance. 132 Idaho 411, 973 P.2d 763. Citing and quoting from *Freeman v. State*, 131 Idaho 722, 963 P.2d 1159 (1998), the Idaho Court of Appeals in *Nickerson* rejected that argument, writing: “...Idaho courts have decided that enhancement provisions based on persistent violator status do not violate the prohibition on *ex post facto* laws”, citing *State v. Polson*, 93 Idaho 912, 478 P.2d 292 (1970), and *Gryger v. Burke*, 334 U.S. 728, 732, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948). 132 Idaho 411, 973 P.2d 763. The Court of Appeals

went on to hold:

We find the Idaho Supreme Court's rejection of Freeman's claim to be dispositive. It is also in accord with the great weight of authority. See *State v. Yellowmexican*, 142 ARix. 205, 688 P.2d 1097 (Ariz.App. 1984); *People v. Snook*, 16 Cal.4th 1210, 69 Cal. Rptr.2d 615, 947 P.2d 808 (1997); *Roberts v. State*, 494 A.2d 156 (Cal. 1985); *People v. Granados*, 172 Ill.2d 358, 217 Ill.Dec. 253, 666 N.E.2d 1191 (1996); *State v. Willis*, 332 N.W.2d 180 (Minn. 1983); *State v. Pratt*, 286 Mont. 156, 951 P.2d 37 (1997); *State v. Levey*, 122 N.H. 375, 445 A.2d 1089 (1982); *Akron v. Kirby*, 113 Ohio App.3d 452, 681 N.E.2d 444 (1996); *Commonwealth v. Hernandez*, 339 Pa.Super. 32, 488 A.2d 293 (1985). We therefore hold that the application of I.C. § 18-8005(7) in Nickerson's case did not violate the constitutional provisions against ex post facto laws.

132 Idaho 411, 973 P.2d 763. *Nickerson* was affirmed in *Wilson v. State*, 133 Idaho 874, 993 P.2d 1205 (Ct.App. 2000). On facts very similar to *Nickerson*, *Wilson* took a different tack and argued that as a matter of statutory interpretation, since I.C. 18-8005(7) did not specifically encompass the use of pre-1992 DUI felony convictions for enhancement purposes, and a 1984 amendment of Idaho's DUI laws disallowed use of prior convictions committed before July 1, 1983, that *Wilson*'s 1990 felony conviction couldn't be used to enhance his 1995 charge to a felony. The Idaho Court of Appeals was not impressed with that argument, writing:

Idaho Code § 18-8005(7) was amended in 1992 to provide that "any person who has *pled* guilty or *has been found guilty* of a felony violation of the provisions of section 18-8004 ... and within ten (10) years *pleads* guilty or *is found guilty* of a further violation of the provisions of section 18-8004 ... shall be guilty of a felony." (emphasis added) By using different tenses to describe the prerequisite DUI conviction, this code section plainly expresses the intent that a pre-1992 felony violation of I.C. § 18-8004 can be used to enhance a subsequent DUI charge to a felony. In describing the prerequisite DUI felony, the statute uses the word "pled" and the phrase "has been found guilty" to denote a past tense. Contrast this with the description of the triggering act that uses the word "pleads" and the phrase "is found guilty" to denote a present or subsequent action. A plain interpretation of the words chosen by the legislature in I.C. § 18-8005(7) evidences an intent that a pre-1992 felony DUI conviction may properly be used to enhance a post-1992 DUI charge to a felony.

Moreover, where a statute with respect to one subject contains a

certain provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed. *Kopp v. State*, 100 Idaho 160, 164, 595 P.2d 309, 313 (1979). In 1984, the Idaho Legislature specifically excluded the use of misdemeanor DUI convictions committed prior to July 1, 1983, for enhancement purposes. 1984 Idaho Sess. Laws, ch. 22, § 2, p. 31. Conversely, the 1992 amendment does not contain such a provision excluding felony DUI convictions entered prior to 1992 for enhancement purposes. Had the legislature intended to exclude pre-1992 DUI felony convictions from the ambit of I.C. 18-8005(7), it could easily and clearly have done so in the enactment. See *Nickerson*, 121 Idaho at 929, 828 P.2d at 1334. By not doing so, the legislature is presumed to have a different intent regarding the use of prior convictions in 1992 than it did in 1984. *Kopp*, 100 Idaho at 164, 595 P.2d at 313; see also *Stroud v. Dept. of Labor and Ind. Serv.*, 112 Idaho 891, 892, 736 P.2d 1345, 1346 (Ct.App.1987).

Finally, the Idaho Legislature, in dealing with DUIs from 1984 forward, has enacted criminal statutes imposing greater punitive measures designed to impress upon the defendant the serious consequences of subsequent violations, and thus deter the defendant from committing repeat offenses. *Nickerson, supra*. We do not think the Idaho Legislature intended to “wipe the slate clean” up to 1992 before the ten-year DUI felony conviction limitation would take effect. Accordingly, we decline to interpret I.C. § 18-8005(7) in such a fashion as would give offenders with a prior DUI felony conviction the opportunity to commit repeat violations without incurring those enhanced penalties.

133 Idaho 880-81, 993 P.2d 1211-12. There is nothing to indicate that in 2006 the Idaho Legislature intended to similarly “wipe the slate clean” and wait until 2011 for the amendment at issue in the present case to take effect.

Since *Nickerson* was authored in 1999, the Nebraska Supreme Court has had occasion to examine changes to that State’s “look back” provision. Nebraska’s “look back” provision for felony DUI crimes increased from eight (8) years to twelve (12) years, due to legislation passed in 1998. In *State v. Hansen*, 258 Neb. 752, 605 N.W.2d 461 (Neb. 2000), Hansen was arrested on a new DUI charge four months after the new statute went into effect. Hansen had two prior DUI convictions in 1988 that were beyond the previous eight year “look back”, but encompassed by the new twelve-year “look back”. Hansen challenged the new law as an *ex post facto* application as applied to his circumstances.

The Nebraska Supreme Court noted, similar to the argument posed by Hoffman in the present case: “Hansen claims that once an offense becomes time barred, a later statute extending the period of limitations cannot revive the offense.” The Nebraska Supreme Court held:

While the principle cited by Hansen is correct, it has no application because the use of the two 1988 DUI convictions is not time barred in the instant case, as the amended enhancement provisions of § 60-6,196 (Reissue 1998) had become effective nearly 4 months prior to Hansen's arrest on August 12, 1998. We considered a nearly identical contention in *State v. Steemer*, 175 Neb. 342, 121 N.W.2d 813 (1963), and our reasoning from that case is controlling. Elwood Steemer had been convicted in 1957 of driving on a suspended license in violation of Neb.Rev.Stat. § 60-418 (Reissue 1952). At that time, the penalty statute, Neb.Rev.Stat. § 60-430 (Reissue 1952), did not provide for an enhanced sentence for second offenses. Thereafter, the Legislature enacted Neb.Rev.Stat. § 60-430.01 (Reissue 1960), which provided for increased penalties against those who are convicted a second time for driving on a suspended license. See *State v. Steemer*, *supra*.

On October 9, 1962, Steemer was convicted for the second time of driving on a suspended license, and the trial court enhanced Steemer's penalty accordingly under § 60-430.01. On direct appeal, Steemer claimed that the consideration of his prior conviction via § 60-430.01 was unconstitutionally ex post facto. This court disagreed, explaining that “[t]he penalty for a second conviction was in existence when [Steemer] committed the second offense; it was not increased after his offense was committed.” *State v. Steemer*, 175 Neb. at 344, 121 N.W.2d at 815.

Likewise, the 12-year look-back provision was in existence in the instant case when Hansen committed his fourth-offense DUI, and the penalty therefore was not increased subsequent to his commission of the offense. Section 60-6,196, in effect at the time of Hansen's arrest in August 1998, provides a sentencing scheme under which an offender's punishment for DUI shall be increased in the event that same offender has been convicted of DUI in the 12 years prior to an instant conviction. See § 60-6,196 (Reissue 1998). The penalty provided in § 60-6,196 for a fourth-offense DUI was not increased *after* Hansen committed his fourth-offense DUI. Hansen was arrested for DUI 4 months after the amendments to § 60-6,196 became effective; therefore, the statute has not been applied in such a manner as to render it an ex post facto law. See *State v. Steemer*, *supra*. See, also, *Berry v. Wolff*, 193 Neb. 717, 228 N.W.2d 885 (1975).

As we said in *State v. Steemer*, 175 Neb. at 344, 121 N.W.2d at 815, § 60-6,196 is a “ ‘statute [which] deals with offenses committed after its passage, permits an inquiry whether [Hansen] has previously [been convicted], and in fixing the penalty does not punish him for his previous offences (sic) but for his persistence in crime.’ ” (Quoting *Taylor v. State*,

114 Neb. 257, 207 N.W. 207 (1926).) In the instant case, Hansen is not receiving additional punishment for his previous convictions, but he is being penalized under the newly amended statutory scheme for persisting in committing the offense of DUI. Hansen's assignment of error is therefore without merit.

605 N.W.2d at 464, 258 Neb. At 754-55. This Court finds this case to be on point and its reasoning compelling. In the present case, it is Hoffman's alleged choice to drink and drive under the influence of alcohol on February 13, 2007, which make up the alleged crime. Hoffman made that decision eight months after the modification to the Idaho statute went into effect. Thus, the ten-year "look back" provision was in place when Hoffman made that decision. Any increase in the penalty resulting in the increase in the look back, occurred eight months before Hoffman committed the present offense. As stated by the Nebraska Supreme Court, Hoffman, in being charged with a felony, is not being punished for his previous offenses, but rather for his persistence in crime.

Before July 1, 2001, the State of Kansas had a statute that stated that for sentencing purposes, any conviction over five (5) years old would not be considered for charging purposes if the same person was later charged with another DUI. Effective July 1, 2001, that "decay period" was abolished and the new statutory language provided that "any convictions occurring during a person's **lifetime** shall be taken into account when determining the sentence to be imposed for a first, second, third, fourth or subsequent offender. K.S.A. 2002 Supp. 8-1567(1)(3). (emphasis added). In holding that since the violation (the new DUI) occurred after the effective date of the statute, no violation of *ex post facto* laws occurred, the Kansas Supreme Court held:

...decisions in other states that have upheld amendments to their DUI statutes increasing the decay period for determining the level of punishment. See *State v. Stoen*, 596 N.W.2d 504, 507-08 (Iowa 1999) (upholding a 6-year increase in the decay period as applied to defendant who violated the amended statute only 52 days after the amendment was effective); *State v. Rolan*, 662 So.2d 446, 448-49 (La.1995) (upholding an

amendment that extended the decay period from 5 years to 10 years); *State v. Chapman*, 685 A.2d 423, 424-25 (Me.1996) (upholding a 4-year increase in the decay period and noting that the defendant had fair notice of the change in the statute which occurred 92 days before the violation); *State v. Hansen*, 258 Neb. 752, 754-55, 605 N.W.2d 461, 463-64 (2000) (upholding 4-year increase in the decay period); *State v. Nilson*, 364 N.W.2d 532, 533-34 (S.D.1985) (approving 1-year increase in the decay provision of DUI statute even though it was not applicable to Nilson's two prior convictions).

Enhancement statutes, like sentencing guidelines or recidivist statutes, are common in state criminal laws and do not change the penalty imposed for the earlier conviction. *Nichols v. United States*, 511 U.S. 738, 747, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994). The amended Norton ordinance did not operate retroactively to increase the penalty for Hurt's prior DUI offense. Instead, the amended ordinance became effective prior to Hurt's second DUI violation and increased the penalty for the second violation only. Because the amendment does not affect Hurt's actions prior to its effective date, it is not an *ex post facto* law.

City of Norton v. Hurt, 275 Kan. 521 at 524, 66 P.3d 870 at 872 (Kan. 2003).

In 1996, the Supreme Court of Montana dealt with a case more similar to *Nickerson*, in that it dealt with statutory changes that created a felony DUI (not a situation such as the present case or in *Hansen* dealing with a statutory change to the "look back" period). On October 1, 1995, the State of Montana legislature made it a felony for a fourth DUI offense. On October 30, 1995, Jerry Walter Brander (Jerry) was charged with a new offense of DUI based on driving on that date, while he had DUI convictions in 1986, 1993 and 1994. The Montana Supreme Court in *State v. Brander*, 280 Mont. 148, 930 P.2d 31 (Mont. 1996) addressed Jerry's claim that his constitutional right to not be subjected to *ex post facto* laws had been violated.

In *Maldonado* [176 Mont. 322, 578 P.2d 296 (1978)], we adopted the reasoning of the U.S. Supreme Court in *Gryger [v. Burke]*, 334 U.S. 728, 68 S.Ct. 1256, 92 L.Ed 1683 (1948)]. In *Gryger*, the defendant claimed that his being charged as a habitual offender under a statute which allowed consideration of a conviction occurring before the habitual offender statute was enacted was unconstitutionally retroactive and *ex post facto*. *Gryger*, 334 U.S. at 729, 68 S.Ct. at 1256. The Court disagreed, holding that consideration of the prior conviction was proper in sentencing under the new statute as the current sentence was not an

additional penalty for the earlier crime, but, rather, was “a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.” *Gryger*, 334 U.S. at 732, 68 S.Ct. at 1258. Citing this language from *Gryger* in *Maldonado*, we rejected the defendant's similar challenge to the application of an amended persistent felony offender statute which took into consideration a conviction occurring prior to the effective date of the amendment. We stated:

The law did not punish defendant for past conduct, but merely notified defendant he was subject to increased punishment, if he in the future committed an additional felony crime.

Maldonado, 578 P.2d at 300.

The fallacy of Jerry's position, however, is that the increase in punishment at issue here is a consequence of his present offense only and this enhancement neither punishes any previous conduct nor increases the penalty for any prior conviction of DUI. In point of fact, the enhancement of Jerry's present DUI to felony status is nothing more nor less than current punishment for his repetitive drunk driving offense. That Jerry's prior behavior is taken into account in charging the current offense as a felony rather than as a misdemeanor does not, without more, constitute *ex post facto* legislation. As we pointed out in *State v. Coleman* (1979), 185 Mont. 299, 605 P.2d 1000, “[s]imply because a statute operates on events antecedent to its effective date does not make the statute *ex post facto*, nor does such operation make a law prohibitively retroactive.” *Coleman*, 605 P.2d at 1010 (citing *Calder v. Bull* (1798), 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 and *Cox v. Hart* (1922), 260 U.S. 427, 435, 43 S.Ct. 154, 67 L.Ed. 332).

Rather, what is critical is that the sanctions of § 61-8-714, MCA, apply only to Jerry's present offense, committed following the effective date of the statutes under which he was charged and sentenced. While Jerry may not have foreseen in 1986 a change in the law in 1995, at the time he committed the instant offense of DUI on October 30, 1995, he was without question on notice that his prior DUI convictions would be considered for charging and sentencing purposes as regards his driving under the influence on that date. That the Legislature chose to punish his repetitive behavior more severely, does not impose a new penalty for an earlier crime. *Maldonado*, 578 P.2d at 300. Jerry had fair warning of what conduct was punishable, and he makes no showing that the Legislature amended § 61-8-714, MCA, arbitrarily or for vindictive purposes. The 1995 amendments to this statute do not change the legal consequences of actions committed prior to October 1, 1995, nor does the present law disadvantage Jerry by imposing an additional burden on his prior conduct that was not present when his earlier DUIs were committed. *Leistikio*, 844 P.2d at 100.

Accordingly, we hold that the District Court correctly concluded that the application of § 61-8-714(6), MCA, did not violate the *ex post facto* clauses of the federal or Montana Constitutions.

280 Mont. 153-55, 930 P.2d 34-35.

At oral argument, Hoffman's counsel cited *Stogner v. California*, 123 S.Ct. 2446, 539 U.S. 607, 156 L.Ed.2d 544 (2003). *Stogner* dealt with a 1993 California statute of limitations that revived actions for sex-related child abuse crimes in certain situations, where the limitations period specified in prior statutes of limitations had already expired. The pertinent difference is *Stogner* concerned a statute of limitations, where the present case does not concern the statute of limitations for prosecuting Hoffman's February 13, 2007, DUI offense. Instead, the present case concerns a "look back" period, or a "decay period", which, as the Supreme Court of Nebraska stated in *Hansen*, simply penalizes Hoffman "under the newly amended statutory scheme for **persisting** in committing the offense of DUI". 605 N.W.2d at 464, 258 Neb. At 754-55. (emphasis added). Or, as the Supreme Court of Montana noted: "the increase in punishment at issue here **is a consequence of his present offense only** and this enhancement neither punishes any previous conduct nor increases the penalty for any prior conviction of DUI" and the fact "That the Legislature chose to punish his **repetitive behavior** more severely, does not impose a new penalty for an earlier crime." 280 Mont. 153-55, 930 P.2d 34-35. (emphasis added).

The majority opinion in *Stogner* noted the revised California statute of limitation which revived a previously time barred prosecution, falls within the "second category" of prohibited *ex post facto* laws. That category concerns situations where the "new law...inflicts punishments where the party was not, by law, liable to **any** punishment." 123 S.Ct. 2446 at 2448, 539 U.S. 607 at 607. (emphasis added). In the present case, even if Hoffman were charged with a misdemeanor, he is subject to punishment (up to one year in jail). Thus, it is not a situation where the new law inflicts punishment where the party was not by law previously liable to **any** punishment.

Stogner is simply not on point. Hoffman's claim at oral argument that *Stogner* overrules *Nickerson* is completely without merit.

Hoffman additionally claims: "Furthermore, the State statutes, court personnel, and basically everyone connected with the criminal justice system told Hoffman that there was a 5-year period of enhancement, which he successfully completed (in 2004) before any change was made in the law." Motion to Dismiss, p. 4. Hoffman's claim that he somehow lacked notice of this enhancement provision, or that it "violates the legal expectations of a defendant in Hoffman's position" (Motion to Dismiss, p. 4), is unavailing. Ignorance of the law is not a defense. Idaho juries are instructed that such is the law. ICJI 1511. *State v. Fox*, 124 Idaho 924, 866 P.2d 181 (1993).

Finally, at oral argument, Hoffman claimed that the prior DUI convictions are an element of his crime, and not elements of an enhancement provision. This argument finds no support in Idaho law, nor in the cases from other jurisdictions cited above. The elements of the crime of Driving Under the Influence are set forth in ICJI 1000 and Idaho Code § 18-8004. Hoffman having been convicted of prior DUI offenses is simply not an element of his February 13, 2007, DUI. The fact that Hoffman has prior DUI offenses is nothing more than an enhancement feature. **If** the jury finds the elements of the February 13, 2007, offense have been proven beyond a reasonable doubt, **then** the jury must decide whether it has been proven (by additional and different evidence than the jury heard during the trial on the February 13, 2007, DUI), that Hoffman was beyond a reasonable doubt convicted of those earlier offenses. ICJI 1008. But those earlier offenses are simply not elements of the offense of Operating a Motor Vehicle while Under the Influence of Alcohol on February 13, 2007.

III. CONCLUSION AND ORDER.

The 2006 amendment to Idaho Code § 18-8005(5) does not violate either the State of Idaho Constitution Article 1, § 16 or the United States Constitution Article 1 § 10 prohibitions against *ex post facto* laws.

IT IS ORDERED that Hoffman's Motion to Dismiss Part II of the Information is **DENIED**.

DATED this 1ST day of May, 2007.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of June, 2008 copies of the foregoing Order were mailed, postage prepaid, or sent by facsimile or interoffice mail to:

Defense Attorney – Dennis Reuter
Prosecuting Attorney – Art Verharen
District I Judges via email

**CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY**

BY: _____
Deputy