REPORT OF CASES DETERMINED

IN THE

SUPREME COURT

AND

COURT OF APPEALS

OF THE

STATE OF NEW MEXICO

1995–1996

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REPORTER

VOLUME 121

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drugs (DWI) does not constitute prior conviction for purposes of criminal enhancement penalties. NMSA 1978, § 66–8–102.

Appeal from the District Court of San Juan County; James L. Brown, District Judge Pro Tem.

Tom Udall, Attorney General, Joel Jacobsen, Asst. Attorney General, Santa Fe, for Plaintiff–Appellant.

Hilary Lamberton, Lamberton & Riedel, Santa Fe, for Defendant–Appellee.

OPINION

BUSTAMANTE, Judge.

1. The State's appeal in this case presents a single issue: whether a valid out-of-state conviction for driving under the influence of intoxicating liquor or drugs (DWI) constitutes a prior conviction sufficient to enhance a sentence under the penalty enhancement provisions of the Motor Vehicle Code, NMSA 1978, §§ 66–1–1 to 66–8–140 [except 66–8–102.1] (Repl.Pamp.1994 & Supp. 1995) (the MVC), specifically the amended DWI statute, Section 66–8–102. For the reasons that follow, we find it does not and thus affirm the district court.

FACTS AND PROCEDURAL BACKGROUND

2. The pertinent facts are not in dispute. On August 8, 1994, Defendant Tommy Nelson (Nelson) was arrested and later charged with DWI under Section 66–8–102. Nelson entered a contingent plea agreement in which he agreed to plead guilty to fourth-degree felony DWI under Section 66–8–102(G) if at sentencing the State was able to prove three or more prior DWI convictions. Alternatively, Nelson agreed to plead guilty to misdemeanor DWI under Section 66–8–102(F) if the State had proof of fewer than three prior DWI convictions. The court accepted Nelson's plea, conditioning the degree of the offense upon the number of prior DWI convictions the State could prove.

3. At the sentencing hearing the State presented evidence of two valid, prior New Mexico DWI convictions and introduced a certified copy of a judgment evincing a 1987 DWI conviction in the Superior Court of Navajo County, Arizona. In Arizona in 1987, it was unlawful to drive with a blood-alcohol concentration of .10% or greater. *See* Ariz. Rev.Stat.Ann. § 28–692 (1988). Driving with that level of blood-alcohol concentration would have also violated the New Mexico DWI statute in effect in 1987. *See* NMSA 1978, § 66–8–102 (Repl.Pamp.1987). The State argued that any valid, provable prior DWI conviction from anywhere in the United States should qualify as a prior conviction for the purposes of the current Sections 66–8–102(F) and (G) and, thus, Nelson had three prior convictions. Nelson admitted that the two prior New Mexico convictions could be used to enhance his sentence. He argued, however, that the Arizona DWI conviction could not be used as proof of a prior conviction for enhancement purposes under Section 66–8–102 because that statute limits enhancement to prior convictions obtained "under this section." The court found the Arizona conviction to be valid but refused to accept it for enhancement purposes because it was not a conviction "under" Section 66–8–102. Accordingly, Nelson pleaded guilty to misdemeanor DWI.

ARGUMENT

4. The State first asserts that a proper construction of the MVC allows the use of valid out-of-state convictions to enhance subsequent convictions under Section 66–8–102, including subsection (G). Section 66–8–102(G) provides:

> Upon a fourth or subsequent conviction *under this section*, an offender is guilty of a fourth degree felony, as provided in Section 31–18–15 NMSA 1978, and shall be sentenced to a jail term of not less than six months which shall not be suspended or deferred or taken under advisement. (Emphasis added.)

The State concedes that if Section 66–8–102(G) is viewed in isolation, the plain meaning of the statute supports the district court's ruling that out-of-state convictions are not prior convictions under that section. However, the State urges us to expand the ap-