

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20050543-CA
v.)	
)	F I L E D
Donald Scott Griffin,)	(March 16, 2006)
)	
Defendant and Appellant.)	2006 UT App 107

Fourth District, Nephi Department, 031600145
The Honorable Donald J. Eyre Jr.

Attorneys: Sheldon R. Carter, Provo, for Appellant
Mark L. Shurtleff and Kenneth A. Bronston, Salt Lake
City, for Appellee

Before Judges Billings, Davis, and Thorne.

PER CURIAM:

Donald Scott Griffin appeals his conviction for driving under the influence of alcohol, a third degree felony. More particularly, Griffin complains that the district court improperly applied Utah Code section 41-6-44(6)(a)(i) to enhance his penalty from a class B misdemeanor to a third degree felony. See Utah Code Ann. § 41-6-44(6)(a)(i) (Supp. 2003).¹ The State concedes that the district court erred in enhancing the penalty and that the case should be reversed and remanded for entry of a new judgment and resentencing.

At the time of Griffin's conviction, Utah Code section 41-6-44(6)(a)(i) stated: "a conviction for violation of Subsection (2) is a third degree felony if it is . . . a third or subsequent conviction under this section within ten years of two or more prior convictions." Id. Therefore, for the enhancement to apply

¹Utah Code Section 41-6-44(6)(a)(i) (Supp. 2003) has since been substituted by and renumbered as Utah Code section 41-6a-503(2)(b). See Utah Code Ann. § 41-6a-503(2)(b) (2005). For purposes of this appeal we will refer to the earlier version of the statute.

there must exist two convictions within ten years of the third conviction. Griffin had previously been convicted of two alcohol-related reckless driving offenses, one on April 26, 1994, and another on November 25, 1997. Griffin committed the offense at issue on August 30, 2003. However, the judgment was not entered and the sentence was not imposed until May 26, 2005. Thus, at the time of his conviction, only one of his previous two convictions was within the ten-year penalty period. Because of this, the enhancement was inapplicable. Accordingly, Griffin should only have been convicted of a class B misdemeanor.

It appears that the district court relied upon this court's decision in State v. Pixton, 2004 UT App 275, 98 P.3d 433, in making its ruling. However, Pixton dealt with a previous incarnation of the same statute. In the previous version of the statute, the ten-year period ran from the commission of the third offense as opposed to the conviction for the third offense.

Griffin's conviction is reversed. The case is remanded to the district court for entry of a new judgment and sentencing consistent with this decision.

Judith M. Billings, Judge

James Z. Davis, Judge

William A. Thorne Jr., Judge