

IN THE DISTRICT COURT OF CHERRY COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

KENNY PAXTON,

Defendant.

Case No. CR00-9

**MEMORANDUM OPINION
AND ORDER**

DATE OF HEARING: August 25, 2000.

DATE OF RENDITION: September 5, 2000.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:
For plaintiff: Eric A. Scott, Cherry County Attorney.
For defendant: Robert D. Coupland with defendant.

SUBJECT OF ORDER: Defendant’s plea in abatement.

MEMORANDUM:

1. Only one of the issues raised by the defendant upon the plea in abatement requires discussion. The other two issues address the weight of the evidence, and lack merit.

2. The complaint filed in county court and the information filed in this court both charge defendant with driving while under the influence of alcohol, fourth offense. The defendant notes that no evidence of prior convictions appears in the county court transcript and suggests that the evidence fails to sustain the county court’s determination of probable cause.

3. While the precise issue has apparently not been decided by the higher Nebraska courts, the decision in *Rains v. State*, 142 Neb. 284, 5 N.W.2d 887 (1942) suggests an answer contrary to the defendant’s argument.

4. This court’s research discloses the great weight of authority to favor the state’s position on this issue. The analysis of the South Dakota Supreme Court succinctly states the essential results of this court’s research:

Some jurisdictions, as defendant points out, require the issue of prior convictions to enhance punishment be alleged and tried in the same manner as the primary offense charged. See *Carter v. State*, Okla. Cr., 292 P.2d 435 and note in 33 N.Y.U. L. REV. 210. However, such procedure is not generally considered to be constitutionally required and our procedure reflects the modern view. *State v. Griffin*, 257 Iowa 852, 135 N.W.2d 77. It avoids prejudice to an accused by withholding the issue of prior convictions until after conviction of the primary offense charged. *State ex rel. Medicine Horn v. Jameson*, 78 S.D. 282, 100 N.W.2d 829. It satisfies due process by granting an accused timely and formal notice of the alleged prior convictions before pleading to the primary charge, in the absence of the jury, and for a trial on the issue of recidivism after conviction. It, furthermore, conforms to the requirement that “where the statute imposes an additional penalty for subsequent convictions, the information upon the subsequent offense should allege the prior conviction. Especially is this true where the first offense is a misdemeanor and the subsequent offense a felony.” *State v. Schaller*, 49 S.D. 398, 207 N.W. 161, and *State v. Kinney*, 53 S.D. 521, 221 N.W. 250. However, contrary to the language used in *State v. Kinney* the issue of prior convictions is not an “essential element” of the offense charged. It is merely an incident relating to the punishment which may be imposed. *State v. O’Neal*, 19 N.D. 426, 124 N.W. 68. As stated in *State v. Cameron*, 126 Vt. 244, 227 A.2d 276, “The fact of a prior conviction or convictions does not become material until after the conviction of the accused on the substantive offense on trial is established * * * and then only for the purpose of enabling the trial judge to impose the proper sentence.”

The purpose of a preliminary examination is to determine whether or not “a public offense has been committed” and if “there is sufficient cause to believe the defendant guilty thereof.” SDCL 23-27-16. See also *State ex rel. Stevenson v. Jameson*, 78 S.D. 431, 104 N.W.2d 45. It is not concerned with the issue of whether or not the accused may be subjected to additional punishment because he may be a persistent violator, *State v. Dunn*, 91 Idaho 870, 434 P.2d 88, as prior conviction is not an element of the offense charged and the possible infliction of a more severe penalty on an accused who is a persistent violator does not create or constitute a new, separate, or independent offense. *State ex rel. Smith v. Jameson*, 70 S.D. 503, 19 N.W.2d 505. Consequently, defendant was not entitled to a preliminary examination on the incidental issue of prior convictions. *State v. Graham*, 68 W. Va. 248, 69 S.E. 1010; 224 U.S. 616, 32 S.Ct. 583, 56 L.Ed. 917; *Rains v. State*, 142 Neb. 284, 5 N.W.2d 887; *Murphy v. State*, 50 Ariz. 481, 73 P.2d 110; *People v. Palm*, 245 Mich. 396, 223 N.W. 67, and *Mann v. State*, 200 Kan. 422, 436 P.2d 358.

State v. Steffenson, 85 S.D. 136, 140-41, 178 N.W.2d 561, 564-65 (1970). Accord, *State v. Washington*, 248 La. 894, 182 So.2d 528 (1966); *Post v. State*, 197 Wis. 457, 222 N.W. 224 (1928).

5. The Oklahoma decision in *Carter v. State*, 1956 Ok. Cr. 4, 292 P.2d 435 (1956) seems more concerned with the failure to include the enhancement information in the preliminary complaint. That differs from the present case. Here, the county court complaint obviously alleged that there were sufficient prior convictions to raise the alleged offense to a felony. The Oklahoma court was more concerned with the defendant's knowledge that the state was pursuing a higher penalty at the time of waiving or electing a preliminary hearing. The decision barely touched on the evidentiary matter.

6. The only other decision supporting defendant's contention, *People v. McDonald*, 233 Mich. 98, 206 N.W. 516 (1925), was not followed or addressed in the later Michigan decision cited by the South Dakota Supreme Court.

7. Moreover, the modern view described by the South Dakota court more accurately follows the decisions of the United States Supreme Court touching on the issue. See *Apprendi v. New Jersey*, ___ U.S. ___ (2000) (No. 99-478); *Jones v. United States*, 526 U.S. 227 (1999); *Almendares-Torres v. United States*, 523 U.S. 224 (1998); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

8. This court concludes that the defendant's contention lacks merit. Accordingly, the plea in abatement should be denied.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The plea in abatement is denied.
2. Subject to any pre-arraignment motions, the matter shall proceed to arraignment on Friday,

September 15, 2000, at 9:30 a.m.

Signed in chambers at Broken Bow, Nebraska, on September 5, 2000.

DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

• Mail a copy of this order to all counsel of record and to any pro se parties.

9 Done on _____, 20__ by ____.

9 Enter judgment on the judgment record.

9 Done on _____, 20__ by ____.

9 Mail postcard/notice required by § 25-1301.01 within 3 days.

9 Done on _____, 20__ by ____.

• Note the decision on the trial docket as: [date of filing] Signed "Memorandum Opinion and Order" entered denying plea in abatement.

9 Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge