

IN THE SUPREME COURT OF THE STATE OF NEVADA

IROC AVELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42946

FILED

DEC 10 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from an order of the district court denying appellant Iroc Avelli's motion for a new trial. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

On November 21, 2002, Avelli was convicted, pursuant to a jury verdict, of robbery with the use of a deadly weapon (count I), battery with the intent to commit a crime (count II), and possession of a firearm by an ex-felon (count III). The district court sentenced Avelli to serve two consecutive prison terms of 36-90 months for count I, a concurrent prison term of 24-90 months for count II, and a concurrent prison term of 13-60 months for count III, and ordered him to pay \$23,653.15 in restitution. Avelli pursued a direct appeal from the judgment of conviction and this court affirmed.¹

On May 28, 2003, while Avelli's direct appeal was pending in this court, he filed a motion for a new trial in the district court. The State opposed the motion. The district court denied Avelli's motion without prejudice, concluding that it would not exercise jurisdiction over the case while Avelli's direct appeal was pending in this court. On November 24,

¹Avelli v. State, Docket No. 40597 (Order of Affirmance and Limited Remand to Correct the Judgment of Conviction, September 22, 2003).

2003, after this court disposed of Avelli's direct appeal, Avelli re-filed his motion for a new trial in the district court. The State opposed the motion. On February 26, 2004, the district court entered an order denying Avelli's motion for a new trial. This timely appeal followed.

Avelli contends that the district court erred in denying his motion for a new trial based on newly discovered evidence. Approximately five weeks after the instant offense, Avelli was arrested in Kansas for speeding; a firearm was found in Avelli's car and confiscated. Eventually, the firearm was forwarded to the Las Vegas Metropolitan Police Department who determined that it was the same weapon used by Avelli during the commission of the crime. Avelli argues that: (1) the firearm was illegally seized by the Kansas Highway Patrol at the time of his arrest; and (2) the allegedly deficient chain of custody record for the firearm was "direct evidence of a . . . failure on the part of the State, and indeed, Kansas authorities to document the proper handling and care of this evidence." We conclude that Avelli's contention is without merit.

NRS 176.515(1) states that "[t]he court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence." In order to grant a motion for a new trial based on newly discovered evidence, the district court must find that the evidence was, in fact, "newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; [and] such as to render a different result probable upon retrial."² The district court has the discretion to grant or deny a timely motion for a new trial, and the district court's

²Funches v. State, 113 Nev. 916, 923-24, 944 P.2d 775, 779-80 (1997).

determination will not be reversed on appeal absent a clear abuse of its discretion.³

We conclude that the district court did not abuse its discretion in denying Avelli's motion for a new trial. In denying Avelli's motion, the district court first ruled that "the State is not even required . . . to recover or produce the weapon at trial. . . . The victim here testified that a gun was used and that's enough."⁴

Second, Avelli alleged that the arresting officer in Kansas admitted after the trial to lying about the stop and arrest. In the officer's incident report and testimony at trial, he stated that immediately after issuing Avelli a speeding citation, he returned Avelli's driver license to him and informed him that he was free to leave the scene. Avelli claims that he was never free to leave because the officer never returned his driver's license to him, and the prolonged stop eventually resulted in the illegal search and seizure of his vehicle. In denying Avelli's motion, the district court noted that the arresting officer in Kansas disputed Avelli's allegation. The arresting officer provided an affidavit stating that he never had a conversation in which he admitted to Avelli's counsel that he lied or was untruthful with regard to when he returned the driver's license, and he stated that he never contradicted his incident report or testimony.

³See Servin v. State, 117 Nev. 775, 792, 32 P.3d 1277, 1289 (2001); Sanborn v. State, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991).

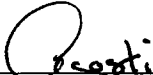
⁴See Harrison v. State, 96 Nev. 347, 350-51, 608 P.2d 1107, 1109-10 (1980) (explaining that the State need not produce deadly weapon at trial and that victim's testimony describing deadly weapon was sufficient to support conviction for robbery with the use of a deadly weapon).

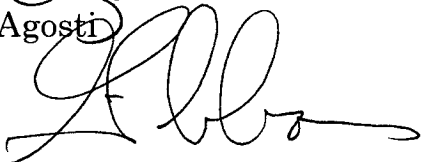
Finally, Avelli's claim that the chain of custody record of the firearm amounts to newly discovered evidence because he did not learn until months after his trial that the chain of custody documentation was flawed is without merit. The district court found that "the issue of chain of custody should have been brought up at trial. This issue was present during the trial, however [it] was never addressed nor was it ever objected to." The district court concluded that Avelli did not proffer any newly discovered evidence with regard to the chain of custody record. We agree – the record was always available and could have been requested by Avelli for use at his trial. Further, as noted above, the State was not even required to provide the gun at trial, and therefore, the allegedly flawed documentation would not render a different result probable upon retrial. Accordingly, we conclude that Avelli has failed to allege facts sufficient to satisfy the requirements for granting a new trial based on newly discovered evidence.

Having considered Avelli's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Joseph T. Bonaventure, District Judge
Kirk T. Kennedy
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk