IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE J. SMITH, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43751

FILED

MAY 02 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
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ORDER OF AFFIRMANCE

This is a direct appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Willie Smith, Jr., was convicted by the district court, pursuant to a jury verdict, of one count of trafficking in a controlled substance. He was sentenced to a term of 180 months in prison with the possibility of parole in 72 months. Smith now appeals, raising three issues.

1. Search and seizure of evidence

Smith contends that about 20 grams of cocaine and $251.00 seized from his pockets by apartment security guards were inadmissible as evidence against him at trial because the seizure violated the Fourth Amendment. He asserts that the security guards who seized the evidence were government actors and that the pat-down search conducted pursuant to Terry v. Ohio[1] involved unconstitutional twisting and manipulating of

[1]392 U.S. 1 (1968).

his clothing.[2] Thus, Smith maintains the district court should have suppressed this evidence. We disagree.

It is well settled that "the Fourth Amendment 'is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the government or with the participation or knowledge of any government official.'"[3] Thus, the threshold issue before us is whether the security guards were indeed government actors. Only then is the Fourth Amendment implicated by their conduct.[4]

The determination of whether an individual is a government actor presents a mixed question of law and fact that "'must be made under the facts and circumstances of each case.'"[5] Whether a person's actions qualify him as a government actor depends on two factors: "(1) whether the government knew of and acquiesced in the intrusive conduct; and (2) whether the party performing the search intended to assist law enforcement efforts or further his own ends."[6] Because the record is void

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[2]See State v. Connors, 116 Nev. 184, 186-88, 994 P.2d 44, 45-46 (2000); Minnesota v. Dickerson, 508 U.S. 366, 368-69 (1993).

[3]State v. Miller, 110 Nev. 690, 696, 877 P.2d 1044, 1048 (1994) (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

[4]See Radkus v. State, 90 Nev. 406, 408, 528 P.2d 697, 698 (1974).

[5]Simmons v. State, 112 Nev. 91, 99, 912 P.2d 217, 221 (1996) (quoting United States v. Taylor, 800 F.2d 1012, 1015 (10th Cir. 1986)).

[6]United States v. Cleaveland, 38 F.3d 1092, 1093 (9th Cir. 1994) (internal citations and quotations omitted).

of any specific factual findings by the district court on this matter that would warrant our deference,[7] we review this matter de novo.[8]

To support his position, Smith contends that the guards were employed by the Department of Housing and Urban Development (HUD) and were charged with enforcing federal regulations and Nevada laws. Other factors he contends support his position include the following: the guards displayed the outward appearance of police officers by wearing badges, carrying guns, and having the state seal on their clothing with the phrase "Special Police" upon it; they received some police-style training; and at least one guard sometimes referred to himself as a federal housing officer. Smith also contends that the guards "worked closely" with the North Las Vegas Police Department, which was evident by the fact that the guards filed a police report after his arrest. All of these factors, Smith maintains, show that the guards indeed acted as government actors on the night of his search and arrest.

Although the record suggests that there was some nexus between HUD, the apartment complex, and the security guards, we conclude that the weight of the competent evidence in the record supports the State's position that the guards acted in a private capacity when they searched and seized Smith. The Fourth Amendment thus did not apply to their conduct. We will explain.

The guards were employed by a private independent contractor, the Eugene Burger Management Company (EBMC), not HUD. They received vacation and sick leave as well as their paychecks directly

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[7]Cf. Miller, 110 Nev. at 694, 877 P.2d at 1047.

[8]See State v. Haberstroh, 119 Nev. 173, 184, 69 P.3d 676, 683 (2003).

from EBMC. Thus, contrary to Smith's assertion, the guards were not employed by HUD or any other government entity.

Smith is correct that the guards' appearance resembled that of police officers, but that does not make them such. Most important, Smith has failed to cite to any knowledge that a government entity knew of and acquiesced in his search and seizure by the guards. Nor has he demonstrated any official investiture of authority to the guards by the government beyond those powers afforded by statute to all citizens.[9] Although one guard appeared uncertain as to his job title, another guard clearly understood his position to be that of a "security guard." And the responsibility of the guards was limited to protecting the apartment complex property and tenants. That the guards contacted the police for assistance and later filed a police report does not establish that they were acting in concert with the police, as that is conduct that any private citizen might engage in under these circumstances.

For the reasons above, we conclude that Smith has failed to demonstrate that the security guards were acting as government actors when they searched and seized him. Without such a demonstration, he cannot show that their conduct violated any protections guaranteed by the Fourth Amendment that would require suppression of the cocaine and money seized by them and later admitted as evidence against him at trial. Suppression of this evidence by the district court was not warranted, and Smith is not entitled to relief.

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[9]Cf. NRS 171.126; NRS 171.136.

2. Alleged Brady violation

Smith next contends that the State violated Brady v. Maryland[10] by failing to disclose a video surveillance tape and photographs allegedly taken on the night of his arrest that showed that he did not damage the apartment security gate. He maintains that this evidence would have shown that the security guards lacked probable cause to detain and search him on suspicion of destroying private property or trespass. We disagree.

To establish a valid Brady claim, a defendant must show that the evidence was favorable to him, the evidence was withheld by the State, and the evidence was material, i.e., prejudicial.[11] As discussed above, the security guards were acting in a private, rather than governmental, capacity when they detained and searched Smith. Thus, even assuming that evidence was withheld by the State that showed the guards did not have reasonable suspicion[12] to detain him, it would nevertheless be immaterial and could not therefore establish a violation of Brady. Rather, evidence admitted at trial showed that the North Las Vegas Police Department had probable cause to arrest Smith on a charge of trafficking in a controlled substance. We conclude that Smith has not established a valid Brady claim and he is not entitled to relief on this basis.

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[10]373 U.S. 83 (1963).

[11]See Bennett v. State, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003).

[12]Smith contends in his brief that "probable cause" that a crime has been committed is necessary "for a stop and search." This is incorrect. Pursuant to Terry, only "reasonable grounds" that criminal activity is afoot are necessary for an officer to briefly detain and search an individual for weapons. See 392 U.S. at 27, 30.

3. Alleged Batson violation

Smith finally contends that the State violated Batson v. Kentucky[13] when it used a peremptory challenge to excuse a potential juror during voir dire, juror 118. Smith notes that he is African-American and asserts that the only reason the State excused potential juror 118 was because she was also African-American. We disagree.

To establish a valid Batson claim, a defendant must first make a prima facie demonstration of racial discrimination by the State in its use of a peremptory challenge to remove a potential juror.[14] Next, the burden shifts to the State to demonstrate a race-neutral explanation for the removal.[15] Finally, even if the State offers a race-neutral explanation, the defendant may still show purposeful racial discrimination if the State's race-neutral explanation was merely a pretext for removing the juror.[16]

Here, the State contended that it exercised a peremptory challenge to excuse juror 118 because she appeared to be young and her husband was unemployed. Based on these factors, the State believed that juror 118 could have undue sympathy toward Smith. The State's proffered justification for its removal of this juror was race-neutral. Moreover, Smith has failed to show that the State acted under any pretext to exclude African-American jurors from his jury. Rather, the record reveals that of the twelve jurors impaneled three were African-American. We conclude

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[13]476 U.S. 79, 89 (1986).

[14]See Kaczmarek v. State, 120 Nev. 314, 332, 91 P.3d 16, 29 (2004).

[15]Id. at 332-33, 91 P.3d at 29.

[16]Id. at 333-34, 91 P.3d at 29-30.

that Smith has failed to demonstrate a violation of Batson occurred and he is not entitled to relief on this basis. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_______________, J.
Maupin

_______________, J.
Gibbons

_______________, J.
Hardesty

cc: Hon. Michelle Leavitt, District Judge
Patti & Sgro, P.C.
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk