IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES AUGUST NORMINGTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43983

FILED

MAR 0 3 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of third-offense DUI. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge. The district court sentenced appellant Charles August Normington to serve a prison term of 20-60 months and ordered him to pay a fine of $2,000.00.

First, Normington contends that the district court erred in denying his motion to suppress evidence of his intoxication.[1] More specifically, Normington argues that he was unlawfully seized when his

[1]We note that Normington failed to include in the appendix his written motion to suppress filed in the district court on March 11, 2004, the State's opposition, and his reply to the State's opposition. Normington also failed to include in the appendix his motion to strike a prior conviction filed in the district court on August 8, 2004, and the State's opposition (discussed later). This court has repeatedly stated that "[a]ppellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.'" Thomas v. State, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) (quoting NRAP 30(b)(3)). Notwithstanding Normington's failure to provide this court with a complete record, neither party objects to the sufficiency of the rough draft transcript of the hearing on his motion or the certified transcript of the sentencing hearing, and we find that the record is adequate, thus enabling a review of the issues for disposition.

vehicle was purposely blocked by a police officer's patrol car despite the fact that the officer did not have "a specific, articulable, and reasonable suspicion, that he was engaged in criminal activity." Normington correctly points out that an anonymous tip, on its own, "lacks sufficient indicia of reliability to provide reasonable suspicion" to justify the initiation of a Terry stop.[2] Nevertheless, we conclude that Normington's contention is without merit.

A police officer may initiate an investigatory stop based only upon a reasonable articulable suspicion that the person or vehicle may be engaged in criminal activity.[3] "[T]here are situations in which an anonymous tip, suitably corroborated, exhibits 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.'"[4] Judicial determinations of reasonable suspicion must be based upon the totality of the circumstances.[5] On appeal, this court will not disturb a district court's findings of fact in a suppression hearing where they are supported by substantial evidence.[6]

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[2]See Florida v. J.L., 529 U.S. 266 (2000); see also Terry v. Ohio, 392 U.S. 1 (1968).

[3]See State v. Sonnenfeld, 114 Nev. 631, 633-34, 958 P.2d 1215, 1216-17 (1998); State v. Wright, 104 Nev. 521, 523, 763 P.2d 49, 50 (1988); see also NRS 171.123(1) ("Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.").

[4]J.L., 529 U.S. at 270 (quoting Alabama v. White, 496 U.S. 325, 327 (1990)) (emphasis added).

[5]See United States v. Arvizu, 534 U.S. 266, 273 (2002).

[6]See State v. Harnisch, 113 Nev. 214, 219, 931 P.2d 1359, 1363 (1997), clarified on rehearing, 114 Nev. 225, 954 P.2d 1180 (1998).

The district court conducted a hearing on Normington's motion to suppress and concluded that: (1) Officer Dan Hunter of the Reno Police Department had reasonable suspicion to justify the initiation of an investigatory stop; and (2) the anonymous tip was sufficiently corroborated by information obtained by Officer Hunter, thus providing "this moderate indicia of reliability necessary as to the elements of illegality." We conclude that substantial evidence supports the district court's determination.

Officer Hunter testified at the hearing that the police dispatch operator received an anonymous telephone call about an intoxicated driver. The anonymous caller accurately described the driver and the vehicle, including the vehicle's license plate number. Officer Hunter responded and located Normington's parked vehicle, unoccupied, in an Albertson's parking lot. Approximately two minutes later, Officer Hunter spotted Normington, he testified:

> The person [Normington] was walking through the parking lot slowly, and staggering when he reached the driver's side door of the vehicle. He attempted to unlock the door with his keys and he dropped the keys on the ground. He then picked the keys up, unlocked the door, and got into the driver's seat and started the engine.

Officer Hunter stated that when Normington started the engine, he pulled the patrol car up behind the left rear of Normington's vehicle and turned on the overhead lights and siren. Normington exited his vehicle with his hands raised in the air. Officer Hunter had a conversation with Normington and then administered a field sobriety test, which Normington failed. After Normington failed the test, Officer Hunter placed him under arrest. In response to a question about Normington's physical condition at the time, Officer Hunter testified that Normington

"was weaving slightly as he stood there, he had a distinct odor of intoxicants, and his speech was slurred." Based on all of the above, we conclude that the district court did not err in denying Normington's motion to suppress evidence of his intoxication.

Second, Normington contends that the district court erred in refusing to instruct the jury that they must unanimously agree on the specific theory of guilt. Normington objected to the following instruction:

> Your verdict in this case must be unanimous; however, you need not unanimously agree upon a particular theory of Driving Under the Influence. It is sufficient that each of you find beyond a reasonable doubt that the defendant was driving, or in actual physical control of a vehicle upon a highway, or upon premises to which the public has access, under any one of the three theories.[7]

Normington, instead, offered two separate instructions and four verdict forms that would have required the jury to unanimously agree on one of the three alternative theories of DUI. We conclude that Normington's contention is without merit.

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[7]NRS 484.379 states in part:

> 1. It is unlawful for any person who:
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> (a) Is under the influence of intoxicating liquor;
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> (b) Has a concentration of alcohol of 0.08 or more in his blood or breath; or
>
> (c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.08 or more in his blood or breath,
>
> to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

NRS 175.161(2) provides that "[i]n charging the jury, the judge shall state to them all such matters of law he thinks necessary for their information in giving their verdict." The district court has broad discretion in giving a particular jury instruction, and its decision to give a particular instruction will not be reversed unless it is arbitrary or exceeds the bounds of law.[8]

We conclude that the district court did not err in overruling Normington's objection to the instruction. In Schad v. Arizona, the United States Supreme Court stated that an instruction requiring a unanimous theory of guilt is only required where theories involve important differences in mens rea such that they involve separate degrees of culpability.[9] This court later stated:

> We now conclude, in accord with the reasoning of the plurality opinion in Schad, that when conflicting or alternative theories of criminal agency are offered through the medium of competent evidence, the jury need only achieve unanimity that a criminal agency in evidence was the cause of death; the jury need not achieve unanimity on a single theory of criminal agency.[10]

Accordingly, we conclude that the district court did not abuse its discretion in giving the instruction in question.

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[8]Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

[9]501 U.S. 624, 633 (1995) (plurality opinion); see also Evans v. State, 113 Nev. 885, 895, 944 P.2d 253, 259 (1997) (citing approvingly to Schad).

[10]See Tabish v. State, 119 Nev. 293, 313, 72 P.3d 584, 597 (2003); see also Moore v. State, 116 Nev. 302, 997 P.2d 793 (2000).

Finally, Normington contends that the district court erred in denying his motion to strike one of the two prior misdemeanor convictions offered by the State to enhance the instant conviction to a felony. Normington argues that his 1997 South Lake Tahoe, California conviction was invalid because the record does not establish that he was advised "of all possible consequences of a guilty plea," or that he voluntarily waived several of his rights by pleading guilty. Normington was represented by counsel during the 1997 proceedings, but argues that he was not present at the change of plea hearing and sentencing, and that the record does not establish that he waived his right to be present. Normington also points out that the waiver of rights form "does not include a case caption, case number, or clerk's filing stamp." We conclude that Normington's contention is without merit.

To establish the validity of a prior misdemeanor conviction, this court has stated that the prosecution must "affirmatively show either that counsel was present or that the right to counsel was validly waived, and that the spirit of constitutional principles was respected in the prior misdemeanor proceedings."[11] "[I]f the state produces a record of a judgment of conviction which shows that the defendant was represented by counsel, then it is presumed that the conviction is constitutionally adequate."[12] The burden shifts to the defendant, represented by counsel, to present evidence to rebut the presumption of constitutionality.[13]

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[11]Dressler v. State, 107 Nev. 686, 697, 819 P.2d 1288, 1295 (1991).

[12]Davenport v. State, 112 Nev. 475, 478, 915 P.2d 878, 880 (1996).

[13]Id.

We conclude that Normington has failed to rebut the presumption that his prior 1997 conviction was constitutionally adequate. The district court conducted a hearing on Normington's motion and noted that the State provided several documents establishing the validity of the prior conviction, including a DUI Advisement of Rights, Waiver, and Plea Form initialed by Normington thirty-two times; the document was also signed by Normington, defense counsel, and the municipal court judge. The district court also disputed Normington's claim that the waiver form did not include a plea by Normington, stating, "I find there is a light check at or on the margin of the no-contest plea box." With regard to the omissions in the waiver form, the district court found them to be of "no consequence" and "irrelevant." In denying the motion, the district court stated, "Obviously, all the constitutional rights were in fact offered to Mr. Normington." We agree and conclude that the district court did not err in denying Normington's motion to strike the 1997 conviction, used by the State for enhancement purposes.

Accordingly, having considered Normington's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Steven P. Elliott, District Judge
Laurence Peter Digesti
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk