IN THE SUPREME COURT OF THE STATE OF NEVADA

GENE ROCHON NAVE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44915

FILED

JUL 19 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary while in possession of a firearm and one count of robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

The district court sentenced appellant Gene Rochon Nave to serve a minimum of 26 months and a maximum of 120 months in prison for his burglary conviction, and it sentenced Nave to concurrently serve a minimum of 48 months and a maximum of 120 months in prison for his robbery conviction.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Nave argues that because 867 days passed between his arraignment date and trial date, his right to a speedy trial and statutory right to a trial within sixty days were violated. In support of his argument, Nave asserts that the State was primarily responsible for the delay and that the district court was partially at fault for not setting his trial date within sixty days. Further, Nave contends that the State did not have good cause to request continuances because Officer Seibold's testimony could have been taken by deposition pursuant to NRS 174.175(1). He argues that the State was not acting with due diligence

because it did not depose Seibold when it became apparent that he would not be available to testify at trial. Nave argues that because he asserted his right to a speedy trial in due course, his right to a speedy trial and right to a trial within sixty days were violated.

The State argues that Nave's rights were not violated because Nave's own requests for continuances were designed to force dismissal of his case and prevent his case from being tried. Further, the State argues that NRS 174.175(1) is permissive in nature and not mandatory. Additionally, the State argues as to Seibold's availability for a deposition and/or availability to sit through trial.

Pursuant to Barker v. Wingo,[1] Adams v. Sheriff,[2] and NRS 178.556,[3] we conclude that Nave's Sixth Amendment right to a speedy

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[1]407 U.S. 514, 529-33 (1972) (holding that a defendant's constitutional right to a speedy trial can be determined only on an ad hoc basis in which the conduct of the prosecution and the defendant are weighed and balanced; among the factors that the court should assess in determining whether a defendant has been deprived of his right are the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant).

[2]91 Nev. 575, 575-76, 540 P.2d 118, 119 (1975) (holding that the sixty-day rule prescribed in the statute has flexibility and that if the defendant is responsible for the delay of going to trial beyond the sixty-day limit, then the defendant may not complain, and noting that "the trial court may give due consideration to the condition of its calendar, other pending cases, public expense, the health of the judge, and the rights of co-defendants") (internal quotation and citation omitted).

[3]NRS 178.556(1) reads in relevant part: "If a defendant whose trial has not been postponed upon his application is not brought to trial within 60 days after the arraignment on the indictment or information, the district court may dismiss the indictment or information."

trial and statutory right to a trial within sixty days were not violated. The record reveals that most of the delays and continuances were caused by Nave, either because Nave or his counsel were not ready to proceed to trial or because Nave was undergoing changes in representation.

A review of the record reveals that Nave did not want his trial to go to overflow and that he did not want to proceed to trial in a different department. We conclude that Nave's unwillingness to have his trial go to overflow belies his intent to invoke his right to a speedy trial. Even though the district court experienced scheduling issues at various times, we conclude that the district court properly afforded itself some flexibility in giving due consideration to its calendar and other pending cases under Adams.[4]

We conclude that the State showed good cause for its continuances.[5] Even though the State could have possibly deposed Seibold, as asserted by Nave, we conclude that Seibold's constant military obligations would have most likely prevented the State from being able to depose him. Nave's failure to request a deposition for Seibold pursuant to NRS 174.175(1) belies his argument related to good cause. Likewise, we

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[4]91 Nev. at 575-76, 540 P.2d at 119.

[5]See Ex Parte Hansen, 79 Nev. 492, 495, 387 P.2d 659, 660 (1963) (holding that the sixty-day statute is intended to prevent arbitrary, willful, or oppressive delay and makes it imperative to order the dismissal of the information unless the prosecution shows good cause for why the defendant has not been brought to trial within sixty days).

conclude that under Ex Parte Hansen,[6] the delays caused by the State were not intended to be arbitrary, willful, or oppressive.

Additionally, we conclude that under Barker,[7] Nave was not unduly prejudiced by the delays. Nave was not in custody for this case, as he was released on his own recognizance (although, he remained in custody for another conviction). Nave has not demonstrated that he suffered any anxiety, that his trial preparation was impaired by having his trial 867 days after arraignment, or that any of Nave's witnesses were not available to testify at trial. Consequently, we conclude that Nave's right to a speedy trial and statutory right to trial within sixty days were not violated.

Nave further argues on appeal that his right to be free from an unreasonable search and seizure was violated when the police stopped him based on a hunch. He contends that when Seibold initially stopped him, Seibold did not enumerate even one articulable fact showing he had reasonable suspicion to believe that Nave was involved in criminal conduct. Nave argues that all of the evidence recovered from his pocket as a result of his stop and search should have been suppressed. It is within the district court's sound discretion to admit or exclude evidence, and this court reviews that decision for an abuse of discretion or manifest error.[8]

The State notes that Seibold had fourteen years of continuous experience in law enforcement and that his then-current area of command

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[6]Id.

[7]407 U.S. at 530.

[8]Thomas v. State, 122 Nev. ___, ___, 148 P.3d 727, 734 (2006).

targeted narcotic dealers, prostitutes, and pimps. The State argues that Seibold had reasonable suspicion that Nave was committing or about to commit a crime based on articulable facts: Seibold witnessed Nave and the female suspect running to the house (in an area known for narcotic sales and high incidences of crime), he saw Nave stooped over the porch, and he saw the female suspect acting as a look-out person. Further, the State argues that when Seibold was notified about the taxicab robbery, Seibold's suspicion became probable cause, which allowed him to detain Nave.

Pursuant to Terry v. Ohio[9] and State v. Lisenbee,[10] we conclude that Nave's protections against an unreasonable search and seizure were not violated. Seibold testified at trial that he felt as if Nave was up to something. Based on his observations detailed above, we conclude that Seibold had reasonable suspicion to believe that criminal activity was taking place. Additionally, we conclude that once Seibold was notified about the taxicab robbery, Seibold had probable cause to detain

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[9]392 U.S. 1, 21 (1968) (holding that "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inference from those facts, reasonably warrant that intrusion").

[10]116 Nev. 1124, 1128, 13 P.3d 947, 950 (2000) (holding that the reasonable, articulable suspicion necessary for a Terry stop is more than an inchoate and unparticularized suspicion or hunch); see also NRS 171.123.

Nave and the female suspect because they matched the descriptions of the perpetrators reported by the police dispatcher.[11]

Additionally, it appears from the record that the evidence, which Nave argues should have been suppressed, was not necessarily a product of Seibold's search of Nave. With the exception of the money, we conclude that the remaining evidence was inevitably discovered outside the presence of Nave and found after Nave was detained for probable cause.[12] As to the money, we conclude that even if it was error for the district court to admit it as evidence, the error was harmless because there was abundant evidence in the record establishing Nave's guilt beyond a reasonable doubt.[13] Consequently, we conclude that Nave's constitutional rights were not violated when the district court admitted the evidence that may have stemmed from Seibold's stop and search of Nave.

As to Nave's contention that it was improper for Officer Arboreen to testify to Nave's invocation of his right to remain silent, Nave did not object below. Although failure to object generally precludes appellate review, we may address errors on appeal if they are plain and if they affected the defendant's substantial rights.[14] Here, we conclude that Nave's substantial rights were not affected. The State did not elicit the testimony, and the testimony was isolated and brief.

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[11]See Devenpeck v. Alford, 543 U.S. 146, 152-53 (holding that the question of whether there was probable cause to arrest is to be determined by an objective standard).

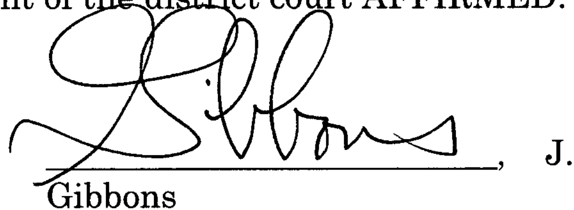
[12]See Camacho v. State, 119 Nev. 395, 402, 75 P.3d 370, 375 (2003).

[13]See Chapman v. California, 386 U.S. 18, 24 (1967).

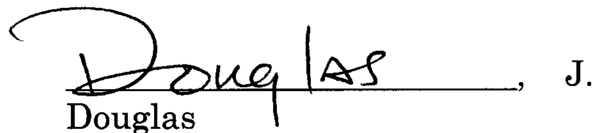
[14]See NRS 178.602.

As to Nave's remaining contentions on appeal relating to Nave's right to represent himself, the prohibition from cruel and unusual punishment, the right to effective assistance of counsel, the prejudice stemming from Nave's courtroom attire, the prejudice stemming from the introduction of Nave's alleged other bad acts, and the jury's purported taint caused by the alleged misimpression that Nave was pretending to have a medical problem, we conclude that they are without merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



____________________, J.
Gibbons



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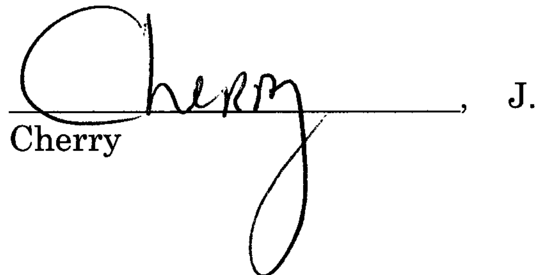
Douglas



____________________, J.
Cherry

cc: Hon. Sally L. Loehrer, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk