

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN TOLE MOXLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46112

FILED

MAY 19 2006

MANETTE M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying appellant's proper person motion for a new trial based on newly discovered evidence. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

On August 27, 2004, the district court convicted appellant, pursuant to a jury verdict, of one count of possession of a stolen vehicle. The district court adjudicated appellant a habitual criminal, and sentenced appellant to a term of life in the Nevada State Prison with the possibility of parole after ten years. This court affirmed appellant's judgment of conviction and sentence.¹ The remittitur issued on August 19, 2005.

Appellant subsequently submitted a proper person motion requesting the district court to grant him a new trial "based on newly

¹Moxley v. State, Docket No. 44002 (Order of Affirmance, June 29, 2005).

discovered evidence."² On October 27, 2005, the district court entered an order denying the motion. This appeal followed.

In his motion, appellant claimed that he was entitled to a new trial because of newly discovered evidence. To warrant a new trial on newly discovered evidence, the evidence must be:

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; such as to render a different result probable upon retrial; not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and the best evidence the case admits.³

The decision to grant or deny a new trial is within the district court's discretion, and this court will not reverse absent abuse of that discretion.⁴

Appellant claimed that a newly discovered witness, Kelly Mengarelli, would testify and discredit the State's witness, Steven Such, who had testified against appellant at trial. Appellant claimed that Mengarelli would testify that Such told her that "he had put 'Rooster' [appellant] in jail, that he had possession of a stolen vehicle and that he told the police that it was 'Rooster's.'" Even if Mengarelli could discredit Such, Such was not a witness "so important that a different result would

²See NRS 176.515(1).

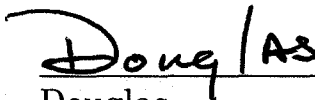
³Funches v. State, 113 Nev. 916, 923-24, 944 P.2d 775, 779-80 (1997).


⁴Id. at 923, 944 P.2d at 779.

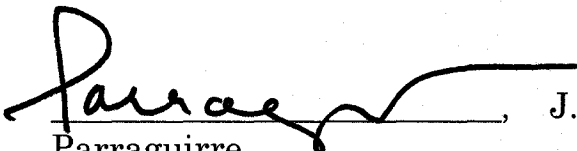
be reasonably probable."⁵ Appellant failed to discredit the State's two main witnesses: Melissa Bifulco, who witnessed appellant's suspicious behavior and possession of the stolen vehicle, and Officer Thomas Stoll, who found appellant hiding in the rafters in the garage. Further, Mengarelli would not have testified to evidence that was not already presented to the jury. The jury was presented with evidence that stolen property was found in Such's residence, and with testimony that appellant had roomed with Such. Appellant failed to demonstrate that a new trial was warranted. Thus, the district court did not err in denying appellant's motion.

Having reviewed the record on appeal, and for the reasons set forth above, we conclude that appellant is not entitled to relief and that briefing and oral argument are unwarranted.⁶ Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Becker


_____, J.
Parraguirre

⁵Id. at 924, 944 P.2d at 780.

⁶See Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975).

cc: Honorable Jackie Glass, District Judge
John Tole Moxley
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk