IN THE SUPREME COURT OF THE STATE OF NEVADA

FLOYD CHARLES GIBSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46300

FILED

APR 21 2006

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 trafficking in a controlled substance. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge. Appellant Floyd Gibson was sentenced to a prison term of 24-60 months.

Gibson raises three issues on appeal. First, Gibson contends the district court erred in its determination that evidence should have been suppressed because the good faith exception should not apply to his situation. The district court concluded that the information contained in the affidavit was similar to that which might be the subject of a "casual rumor" and did not set forth specific details that would provide sufficient indicia of reliability to satisfy constitutional requirements.[1] But, the district court did find that the evidence was seized by law enforcement acting in good faith pursuant to a facially valid search warrant issued by a magistrate acting within her judicial role, and therefore suppression was not appropriate.[2]

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[1]Alabama v. White, 496 U.S. 325 (1990) (Informant's veracity, reliability and basis of knowledge are relevant to determining probable cause).

[2]U.S. v. Leon, 468 U.S. 897 (1984) (The Fourth Amendment exclusionary rule should not be applied so as to bar the use of evidence

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Law enforcement in its application for the search warrant indicated that the source of the information was anonymous, which was not true. The officer said this to protect the identity of the informant.

> United States v. Leon does not stand for appellants' proposition that the detective's failure to include all facts of which he may have knowledge concerning the character of an informant establishes bad faith of the officer justifying suppression of evidence. Rather, suppression is appropriate if the officers were dishonest or reckless in preparing their affidavit.[3]

Pursuant to an in camera hearing, the district court was satisfied that law enforcement's failure to reveal the source of information did not amount to a reckless disregard for the truth, but arose out of regard for the informant's safety.

Although it is the statements of the affiant, and not informants, which may be challenged, an officer may not insulate his testimony on the basis that it was told to him by another officer.[4] Therefore, it is a different standard when an informant provides false information to a police officer and when another police officer provides false information to another police officer.

We conclude the dishonesty involved in securing the warrant was "of only peripheral relevancy to the showing of probable cause, and,

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. . . *continued*
obtained by officers acting in reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be invalid).

[3]Point v. State, 102 Nev. 143, 149, 717 P.2d 38, 42-43 (1986), disapproved of on separate grounds by Stowe v. State, 109 Nev. 743, 857 P.2d 15 (1993).

[4]Franks v. Delaware, 438 U.S. 154, 164 n.6 (1978).

not being within the personal knowledge of the affiant, did not go to the integrity of the affidavit."[5]

Second, Gibson asserts the evidence should be suppressed because he was illegally arrested when placed in handcuffs prior to receiving his Miranda[6] warnings. Gibson was informed he was not under arrest and was free to go, but offered a ride if he would consent to a transport belt and being handcuffed. Gibson consented to the restraint as a condition of law enforcement giving him a ride in their vehicle. Gibson slept during the ride to the next town. Upon their arrival, the restraints were removed from Gibson and he was again told he was free to leave.

"[A] trial court's custody and voluntariness determinations present mixed questions of law and fact subject to this court's de novo review."[7] The inquiry necessitates a two-step analysis. The district court's factual findings relative to the "scene- and action-setting" circumstances surrounding an interrogation are entitled to deference and are reviewed for clear error.[8] "However, the district court's ultimate determination of whether a person was in custody and whether a statement was voluntary will be reviewed de novo."[9]

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[5]Rugendorf v. United States, 376 U.S. 528, 532 (1964).

[6]Miranda v. Arizona, 384 U.S. 436 (1966).

[7]Rosky v. State, 121 Nev. ___, ___, 111 P.3d 690, 694 (2005).

[8]Id.

[9]Id.

The district court concluded that the brief transport of the defendant, who accepted the offered ride and was repeatedly told that he was not in custody and free to go, did not amount to custody or arrest.[10]

The United States Supreme Court has provided that "the ultimate inquiry is simply whether there [was] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest."[11] When analyzing the situation, the court must consider the totality of circumstances, and although no single factor is dispositive, the following is important to the analysis:

> (1) the site of the interrogation,
>
> (2) whether the investigation has focused on the subject,
>
> (3) whether the objective indicia of arrest are present, and
>
> (4) the length and form of questioning.[12]

The site of the interrogation was a parking lot during a snowstorm. The investigation was clearly focused on Gibson from the outset. The objective indicia of arrest are not present, as Gibson was under no obligation to travel with law enforcement in restraints. Gibson was not questioned while he was in the vehicle.

The United States Court of Appeals for the Ninth Circuit has concluded "there is no per se rule that detention in a patrol car constitutes

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[10]See State v. Neumeyer, 652 N.W.2d 133 (Wis. Ct. App. 2002). The case the district court cites to is an unpublished order from Wisconsin.

[11]California v. Beheler, 463 U.S. 1121, 1125 (1983)(quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)).

[12]Alward v. State, 112 Nev. 141, 155, 912 P.2d 243, 252 (1996), overruled on other grounds by Rosky, 121 Nev. ___, 111 P.3d 690.

an arrest,"[13] and a 20 minute detention in a police car to be reasonable when a suspect voluntarily enters the vehicle because it is cold outside.[14]

Because Gibson voluntarily entered the vehicle, was not questioned while in restraints and repeatedly was informed he was free to leave, we conclude the district court did not err in its determination that Gibson was not in custody prior to receiving his Miranda warnings in the parking lot.

Finally, Gibson contends a jury instruction improperly shifted the burden of proof. Specifically, Gibson asserts that because the district court used the words "innocence" instead of "lack of guilt" the burden of proof was somehow shifted.[15] We conclude Gibson's claim lacks merit. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Rose

_____, J.
Douglas

_____, J.
Parraguirre

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[13]U.S. v. Parr, 843 F.2d 1228, 1230 (9th Cir. 1988).

[14]U.S. v. Torres-Sanchez, 83 F.3d 1123, 1129 (9th Cir. 1996).

[15]Both NRS 175.191 and NRS 175.201 use the word "innocent" not "lack of guilt."

cc: Hon. J. Michael Memeo, District Judge
Elko County Public Defender
Attorney General George Chanos/Carson City
Elko County District Attorney
Elko County Clerk