IN THE SUPREME COURT OF THE STATE OF NEVADA

ARNOLD DEAN ANDERSON A/K/A DEAN ARNOLD ANDERSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47569

FILED

SEP 07 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of operating a vehicle while under the influence of alcohol (DUI). Seventh Judicial District Court, White Pine County; Dan L. Papez, Judge. The district court sentenced appellant Arnold Dean Anderson to serve a term of 28 to 72 months in prison.

Anderson raises several claims on appeal. He first contends that he received a harsher sentence after retrial because he successfully exercised his right to appeal in violation of his due process rights. Specifically, he argues that the district court punished him by ordering his sentence to run consecutively to the sentence imposed in another case rather than concurrently as presumed in the original judgment of conviction from his first trial.[1] A district court may not punish a defendant for exercising his constitutional rights, and the burden rests with the defendant "to provide evidence that the district court sentenced

[1]See NRS 176.035(1).

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him vindictively."[2] Here, the district court expressly stated during the original sentencing hearing that it intended the judgment of conviction from Anderson's first trial to designate consecutive sentences.

As further support for his claim, Anderson points to the prosecutor's comment during sentencing after retrial that "It's a good thing that Mr. Anderson appealed." However, the prosecutor followed this comment with a statement that the error in the original judgment of conviction could be corrected by merely amending it. We discern nothing from this comment indicating that Anderson was being punished for successfully exercising his right to appeal. Rather the comment reflects the prosecutor's erroneous belief that an omission in the original judgment of conviction could be remedied by amendment after reversal and remand in this instance. Consequently, we conclude that Anderson's claim lacks merit.

Anderson also argues that the district court erred in denying his motion to dismiss the charge on the ground that the State lost a videotape of his booking process. Anderson contends that the missing videotape was material because it contradicted Nevada Highway Patrol Officer Scott Simon's testimony that Anderson and Simon engaged in a heated argument over Anderson's refusal to have blood drawn for a blood

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[2]Mitchell v. State, 114 Nev. 1417, 1428, 971 P.2d 813, 820 (1998), overruled in part on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

alcohol test.[3] The district court denied Anderson's motion, concluding that the value of the videotape at trial was speculative and that other avenues were available to inquire into the booking process, including offering the testimony of another officer present at the time and cross-examination of Simon. Although the videotape may have shed light on events surrounding the booking process, we conclude that Anderson has not demonstrated that he was unduly prejudiced by the loss of this evidence in light of counsel's challenges to Simon's credibility at trial and the evidence presented establishing Anderson's guilt.[4] Consequently, we conclude that the district court did not abuse its discretion in denying Anderson's motion to dismiss.[5]

Anderson next argues that the district court erred in denying his motion in limine to preclude admission of the results of a breath test. In his motion, Anderson contended that Simon failed to properly administer the Intoxilyzer 5000 test, rendering the results inadmissible. Simon testified that he was certified to operate the Intoxilyzer 5000, he

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[3]Anderson further argues that the videotape was relevant to show his level of intoxication because the Intoxilyzer 5000 test results are invalid. However, as discussed below, we conclude that the district court did not err in admitting the test results.

[4]See Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (1999). The parties agreed that the State did not act in bad faith in the loss of the videotape.

[5]See McNelton v. State, 115 Nev. 396, 414, 990 P.2d 1263, 1275 (1999).

followed the checklist in administering the test, and he entered all information into the machine correctly except for the solution lot number. Trace evidence examiner Andra Lewis Krick testified that at the time of the offense, she was the lead representative for the breath-alcohol program in northern Nevada. Her duties in that capacity included calibrating the Intoxilyzer 5000, ensuring that the machine was operating properly, responding to any necessary maintenance or repair, and certifying law enforcement officers on administering breath tests. Krick further testified that on May 12, 2001, when Anderson's breath was tested, the Intoxilyzer 5000 was properly calibrated and maintained and was functioning correctly.[6] Krick stated that Simon's entry of an incorrect solution lot number had "absolutely" no effect on the test results. Counsel cross-examined Krick respecting the machine's operation, error rate, and the effect of human error on test results. Based on the evidence presented, we conclude that the district court did not abuse its discretion in denying Anderson's motion in limine.[7]

Finally, Anderson complains that the district court lacked jurisdiction to amend the original judgment of conviction from his first trial to reflect that his sentence was to run consecutively to a sentence imposed in another case. Although the district court lacked jurisdiction to amend the original judgment of conviction, it entered a new judgment of

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[6]See NRS 484.389(4).

[7]See Whisler v. State, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005).

conviction after Anderson's retrial. Therefore, we conclude that Anderson's argument in this regard is moot.

Having considered Anderson's claims and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Dan L. Papez, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General Catherine Cortez Masto/Carson City
White Pine County District Attorney
White Pine County Clerk