

IN THE SUPREME COURT OF THE STATE OF NEVADA


ORUS ALTON MCCEIG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49262

FILED

FEB 25 2008

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

This is an appeal from a judgment of conviction, entered pursuant to a guilty plea, of one count of felony driving under the influence (DUI). Second Judicial District Court, Washoe County; Steven P. Elliott, Judge. The district court sentenced appellant Orus Alton McCeig to serve a prison term of 30 to 110 months.

McCeig contends that the district court erred in denying his pretrial petition for a writ of habeas corpus.¹ McCeig specifically claims that the justice court violated his right to have a preliminary hearing within 15 days of his arraignment when it granted the State's motion for a continuance. The State concedes that the prosecutor failed to satisfy the requirements of DCR 14, Hill v. Sheriff,² and Bustos v. Sheriff.³

¹McCeig entered a conditional guilty plea pursuant to NRS 174.035(3), preserving the pretrial issues he raised in his habeas petition for appeal.

²85 Nev. 234, 452 P.2d 918 (1969).

³87 Nev. 622, 491 P.2d 1279 (1971).

NRS 171.196(2) provides that "[i]f the defendant does not waive [the preliminary] examination, the magistrate shall hear the evidence within 15 days, unless for good cause shown he extends such time." In Hill, we held that

Before a magistrate may decide whether statutory "good cause" exists, the party seeking a continuance of a preliminary examination upon the ground of the absence of witnesses must prepare and submit to the magistrate an affidavit stating: (a) the names of the absent witnesses and their present residences, if known; (b) the diligence used to procure their attendance; (c) a brief summary of the expected testimony of such witnesses and whether the same facts can be proven by other witnesses; (d) when the affiant first learned that the attendance of such witnesses could not be obtained; and (e) that the motion is made in good faith and not for delay.⁴

In Bustos, we held that where the State does not learn of a witness's absence in time to prepare a Hill affidavit, the prosecutor may be sworn and orally testify to the same factual matters that would be stated in affidavit form if time was available to prepare one.⁵ Hill and Bustos

⁴85 Nev. at 235-36, 452 P.2d at 919.

⁵87 Nev. at 624, 491 P.2d at 1280-81.

establish jurisdictional procedural requirements that must be met before a justice court can exercise its discretion to continue a preliminary hearing.⁶

Here, at the date and time set for the preliminary hearing, the prosecutor orally moved for a continuance. The prosecutor claimed that the arresting officer was unavailable because he was in training. Whereupon the following colloquy occurred:

THE COURT: And are we making a Hill Bustos? Do I need to swear you in? Or are you just requesting it?

MS. LUGASKI (Prosecutor): Actually, I found out about it probably at the beginning of the week. So I can do a Hill-Bustos, but prefer just to put it on the record.

THE COURT: Okay. The record is fine. Whatever you want to do. All right. So, within 15 days, in an afternoon, if possible; correct?

McCeig objected to the continuance and asked that the matter be dismissed for failure to prosecute or, in the alternative, that he be released on his own recognizance. However, the justice court declined to release McCeig on his own recognizance and granted the State's motion for a continuance. The preliminary hearing was continued a second time due to a power outage in the justice court building. Thereafter, the prosecutor dismissed the case pursuant to NRS 174.085, obtained a grand jury

⁶See State v. Nelson, 118 Nev. 399, 403-04, 46 P.3d 1232, 1234-35 (2002); Sheriff v. Hatch, 100 Nev. 664, 667 n.1, 691 P.2d 449, 451 n.1 (1984); Sheriff v. Blackmore, 99 Nev. 827, 830, 673 P.2d 137, 138 (1983).

indictment charging McCeig with felony DUI, and secured a bench warrant for McCeig's arrest.

Based on these circumstances, we conclude that the justice court granted the continuance in violation of the procedural requirements of Hill and Bustos. However, because the prosecutor subsequently dismissed the case and later obtained an indictment, McCeig was not prejudiced by the procedural errors that occurred in the original case.⁷

To the extent that McCeig claims that the prosecutor improperly dismissed the case, we conclude that his claim is without merit. NRS 174.085(5) unambiguously authorizes the prosecutor to once dismiss a felony complaint before a preliminary hearing. A prosecutor does not have to show good cause for using this dismissal power.⁸ However, it may not be used to violate the defendant's constitutionally guaranteed rights.⁹ Here, the preliminary hearing had not yet been held and the complaint had not previously been dismissed. So the prosecutor had authority pursuant to NRS 174.085(5) to dismiss the complaint. McCeig has not shown that his constitutional rights were violated by the dismissal and our review of the record on appeal has not revealed any

⁷We note that the habeas court was not required to make a "conscious indifference" finding because the justice court did not dismiss the case. See Blackmore, 99 Nev. at 829, 673 P.2d at 138.

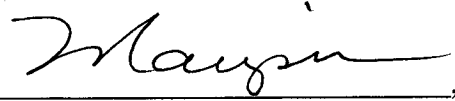
⁸Sheriff v. Marcus, 116 Nev. 188, 193, 995 P.2d 1016, 1019 (2000).

⁹Id.

constitutional violations. Accordingly, we conclude that the prosecutor properly dismissed the complaint.

Having considered McCeig's contentions and for the reasons discussed above, we

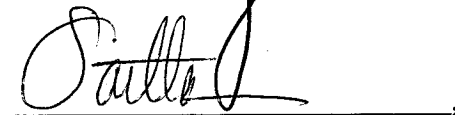
ORDER the judgment of conviction AFFIRMED.

 _____, J.

Maupin

 _____, J.

Cherry

 _____, J.

Saitta

cc: Hon. Steven P. Elliott, District Judge
Paul E. Quade
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk