IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN THOMAS CLOUD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50774

FILED

JUL 11 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of two counts of driving under the influence of alcohol and causing death and/or substantial bodily harm to another person. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge. The district court sentenced appellant John Thomas Cloud to serve two concurrent prison terms of 80 to 200 months.

First, Cloud contends that the district court violated his federal and state constitutional rights by failing to suppress statements that were made without Miranda[1] warnings. Specifically, Cloud claims that he was handcuffed, administered a field sobriety test, and asked questions without the benefit of a Miranda warning.

The Fifth Amendment privilege against self-incrimination provides that statements made by a suspect during a custodial interrogation are inadmissible unless the police first provide a Miranda

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

warning.[2] An individual is deemed in custody where there has been a formal arrest or where there has been a restraint on freedom of movement of the degree associated with a formal arrest so that a reasonable person would not feel free to leave.[3] We consider the totality of the circumstances in determining whether a defendant was in custody during police questioning.[4] "Important considerations include the following: (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."[5]

Here, the district court heard testimony that Cloud left the accident scene and entered a convenience store. Sergeant James Carroll escorted Cloud back to the accident scene in handcuffs, where they were met by Detective Corey Moon. Detective Moon was part of a team assigned to investigate fatal traffic accidents. That evening, he was in uniform and was responsible for determining whether Cloud was impaired. In Cloud's presence, he asked Sergeant Carroll why Cloud was in handcuffs, told Sergeant Carroll to remove the handcuffs, and stated that Cloud was "not under arrest yet." Detective Moon then asked Cloud

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[2]State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998); see also Miranda, 384 U.S. at 478-79.

[3]Taylor, 114 Nev. at 1082, 968 P.2d at 323.

[4]Alward v. State, 112 Nev. 141, 154, 912 P.2d 243, 252 (1996), overruled on other grounds by Rosky v. State, 121 Nev. 184, 111 P.3d 690 (2005).

[5]Id. at 154-55, 912 P.2d at 252.

to go to a location on the street intersection that was behind an emergency vehicle, on the other side of his vehicle, and away from the spectators and flashing lights. Cloud went to that location voluntarily. When Detective Moon left Cloud to talk to someone else, a patrol officer was standing with Cloud. While Detective Moon administered a field sobriety test, he asked Cloud general questions. Among his questions were "why did you run the red light?" Cloud responded, "I guess I missed it." Five or ten minutes later, after completing the field sobriety test, Detective Moon determined that Cloud was intoxicated and formally placed him under arrest. Under these circumstances, we conclude that Cloud was not in custody for Miranda purposes and that the district court did not err by denying his pretrial suppression motion.[6]

Second, Cloud contends that the prosecutor improperly argued that the district court should consider the "societal interest" in reaching its sentencing decision. Cloud failed to cite to any pages in his appendix that support his assertion,[7] and our review of the sentencing transcript reveals that Cloud did not object to any of the prosecutor's sentencing arguments.

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[6]Cf. Berkemer v. McCarty, 468 U.S. 420, 440 (1984) (holding that persons temporarily detained pursuant to routine traffic stops are not in custody for Miranda purposes); Dixon v. State, 103 Nev. 272, 274, 737 P.2d 1162, 1164 (1987) (a Miranda warning is not required "before reasonable questioning and administration of field sobriety tests at a normal roadside traffic stop").

[7]See NRAP 3C(e)(2).

As a general rule, the failure to object to prosecutorial misconduct precludes appellate review absent plain error.[8] We have held that in order for prosecutorial misconduct to constitute reversible error, it must be prejudicial.[9] Moreover, we have repeatedly declined to interfere with a sentencing determination when the sentence is legal, within the statutory limits, and not supported solely by impalpable and highly suspect evidence.[10]

Here, the sentence imposed by the district court is legal and within the parameters provided by the relevant statute,[11] none of the prosecutor's comments rise to the level of plain error,[12] and nothing in the record indicates that the district court relied solely upon the prosecutor's comments in determining the sentence. Accordingly, we conclude that this claim is without merit.

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[8]Williams v. State, 103 Nev. 106, 110-11, 734 P.2d 700, 703 (1987).

[9]See Sherman v. State, 114 Nev. 998, 1010, 965 P.2d 903, 912 (1998).

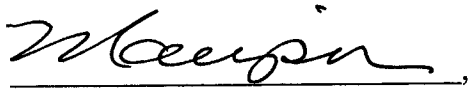
[10]See Denson v. State, 112 Nev. 489, 493, 915 P.2d 284, 287 (1996); see also Cameron v. State, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998).

[11]See NRS 484.3795(1).

[12]Cf. Ybarra v. State, 103 Nev. 8, 15, 731 P.2d 353, 358 (1987) ("Factual matters outside the record are not generally proper subject for argument at penalty unless counsel is discussing general theories of penology, punishment, deterrence and the death penalty.").

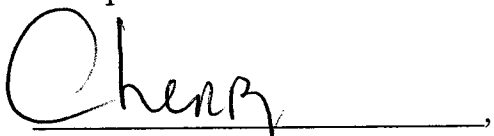
Having considered Cloud's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



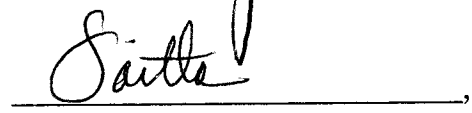
, J.

Maupin



, J.

Cherry



, J.

Saitta

cc: Hon. Kenneth C. Cory, District Judge
Albright Stoddard Warnick & Albright
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk