IN THE SUPREME COURT OF THE STATE OF NEVADA

SHERIFF, NYE COUNTY,
Appellant,
vs.
JOHNNY DEWAYNE DOWLING,
Respondent.

No. 50882

FILED

APR 30 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order granting a pretrial petition for a writ of habeas corpus. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Respondent Johnny Dewayne Dowling was charged with offer, attempt, or commission of unauthorized acts related to controlled substance. After a preliminary hearing and arraignment, Dowling filed a petition for a writ of habeas corpus. After holding a hearing, the district court granted Dowling's petition. On appeal, appellant Nye County Sheriff argues that the district court erred in granting the writ because a justice of the peace can consider hearsay for purposes of determining probable cause during a preliminary hearing. We disagree. The parties are familiar with the facts, and we do not recount them here except as necessary to our disposition.

STANDARD OF REVIEW

"NRS 171.206 requires the magistrate to hold an accused to answer in the district court if from the evidence produced at the preliminary examination it appears: '. . . that there is probable cause to believe that an offense has been committed and that the defendant has committed it.'" Graves v. Sheriff, 88 Nev. 436, 439, 498 P.2d 1324, 1326

(1972) (quoting NRS 171.206). "[T]he [district] court can only inquire into whether there exists any substantial evidence which, if true, would support a verdict of conviction. The court may not resolve a substantial conflict in the evidence because that is the exclusive function of the jury." Sheriff v. Dhadda, 115 Nev. 175, 180, 980 P.2d 1062, 1065 (1999) (citations omitted).

In determining whether there is "sufficient independent evidence of the corpus delecti, a reviewing court should assume the truth of the state's evidence and all reasonable inferences from it in a light most favorable to the state." Id. "Probable cause to bind a defendant over for trial may be based on slight, even marginal, evidence because it does not involve a determination of guilt or innocence of an accused." Id. "Absent a showing of substantial error on the part of the district court in reaching such [factual] determinations, this court will not overturn the granting of pretrial habeas petitions for lack of probable cause." Sheriff v. Provenza, 97 Nev. 346, 347, 630 P.2d 265, 265 (1981).

DISCUSSION

The district court granted Dowling's pretrial writ, determining that this court has not held that illegal or incompetent evidence may be used at a preliminary hearing. As a result, the district court concluded that Dowling's objection to Terrill Tinnell's testimony regarding his conversations with Joey Tarragano and Oscar Robledo as hearsay was a legal and proper objection. Based on Dowling's legal and proper objection, the district court concluded that the magistrate should have sustained the objection because the State failed to invoke any exception to the hearsay rule. Because we have held that "evidence received at a preliminary examination must be legal evidence," Goldsmith v. Sheriff, 85 Nev. 295,

303, 454 P.2d 86, 91 (1969), Dowling's objection should have been sustained. In reaching this conclusion, the district court relied on our reasoning in Goldsmith that "'[t]he constitutional guarantee of due process of law requires adherence to the adopted and recognized rules of evidence.'" Id. (quoting People v. Schuber, 163 P.2d 498, 499 (Cal. App. 1945)).

Indeed, we have iterated that "'[t]he rule which requires less evidence at a preliminary examination, or even slight evidence, merely goes to the quantum, sufficiency or weight of evidence and not to its competency, relevancy or character.'" Id. at 303, 454 P.2d at 92 (quoting Schuber, 163 P.2d at 500). We have relied on Goldsmith for its proposition that only legal, competent evidence will authorize a magistrate to hold a person for trial. Miner v. Lamb, 86 Nev. 54, 58-59, 464 P.2d 451, 453 (1970). The only issue here is whether our recent holding in Sheriff v. Witzenburg, 122 Nev. 1056, 145 P.3d 1002 (2006), overrules Goldsmith and its progeny. We conclude that it does not.

In Witzenburg, we considered whether the Sixth Amendment Confrontation Clause and Crawford v. Washington, 541 U.S. 36 (2004), apply at a preliminary hearing. Witzenburg, 122 Nev. at 1057, 145 P.3d at 1003. In Witzenburg, because three victims lived outside Nevada, the State introduced affidavits from the victims to establish the element that "the witness was the owner of property and that the defendant did not have permission to possess the witness's property." Id. at 1058, 145 P.3d at 1003; see NRS 171.197(1)(a), (b). Witzenburg filed a pretrial petition for a writ of habeas corpus arguing that his constitutional rights to confrontation had been violated because he was unable to cross-examine the victims as their statements had been admitted by affidavit.

Witzenburg, 122 Nev. at 1058, 145 P.3d at 1003. The district court granted Witzenburg's petition. Id. at 1058-09, 145 P.3d at 1003. On appeal, this court reversed the district court order granting the writ and concluded that the "Sixth Amendment Confrontation Clause and Crawford do not apply at a preliminary examination." Id. at 1058, 145 P.3d at 1003.

The Sheriff argues that Witzenburg is identical to the case at bar in that Tinnell's testimony, even if based on hearsay, was admissible at the preliminary hearing because it was not subject to the Sixth Amendment Confrontation Clause and Crawford. The Sheriff thus contends that hearsay testimony should be admissible at a preliminary hearing because it is as legal and competent as the evidence presented in Witzenburg, which this court deemed not subject to the Sixth Amendment Confrontation Clause and Crawford..

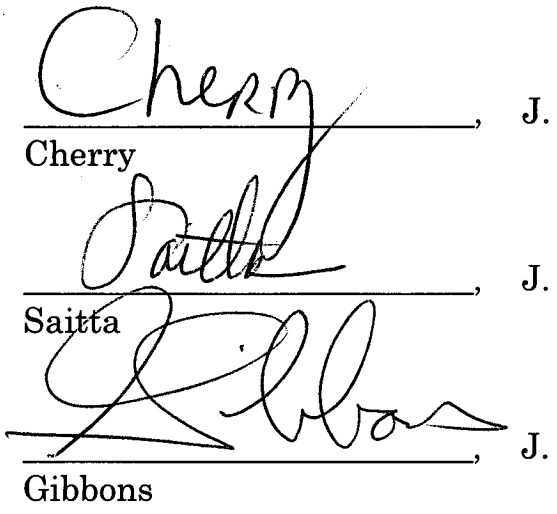
We conclude that the Sheriff's argument is without merit because Witzenburg is not factually similar to the case here nor does it create a broad rule that allows the admission of hearsay testimony at a preliminary examination. To the contrary, this court noted in Witzenburg that NRS 171.197 created a qualified exception to the right to cross-examine witnesses and that the statute also provided defendants with "a mechanism with which he can challenge an affidavit the State attempts to introduce against him." 122 Nev. at 1062, 145 P.3d at 1006. Consequently, this court's holding in Witzenburg is not a blanket statement that all evidence not subject to cross-examination is now admissible at a preliminary examination.

Given the high deference this court bestows upon a district court's decision to grant of a pretrial writ of habeas corpus, we conclude that the district court did not err in granting the writ. The Sheriff has not

shown substantial error in the district court's finding that Dowling's objection to the hearsay testimony—the only evidence offered at the preliminary examination—should have been sustained.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Cherry

_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Robert W. Lane, District Judge
Attorney General Catherine Cortez Masto/Carson City
Nye County District Attorney/Pahrump
Gibson & Kuehn
Nye County Clerk