

IN THE SUPREME COURT OF THE STATE OF NEVADA

SEDRIC LEE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50893

FILED

JAN 08 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of carrying a concealed firearm without a permit. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. The district court sentenced appellant Sedric Lee to a prison term of 12 to 48 months.

First, Lee contends that the district court erred in denying, as untimely, his pretrial motion to suppress evidence seized during a pat-down search. He argues that the district court should have exercised its discretion to hear the suppression motion. He further asserts that the police did not have reasonable suspicion to justify the search.

A district court's decision to conduct an evidentiary hearing regarding an untimely motion to suppress is reviewed for an abuse of discretion. Williams v. State, 118 Nev. 536, 553-54, 50 P.3d 1116, 1127 (2002). Motions to suppress must be filed "not less than 15 days before the date set for trial." NRS 174.125(1), (3)(a). The court may hear an untimely motion to suppress if the defendant waives hearing on the motion or demonstrates good cause for his failure to file sooner. NRS

174.125(3)(b). However, “[g]rounds for making such a motion after the time provided or at the trial must be shown by affidavit.” NRS 174.125(4).

In his motion, Lee asserted that good cause existed to excuse the untimely motion because he did not receive a copy of the 911 tape and did not receive the CAD report until only days before trial. He asserted that the CAD report indicated that the 911 caller (1) reported to the police that she needed assistance getting her child back from her husband, whose physical description did not match appellant; (2) stated that her husband was not armed; and (3) did not mention any weapons, violence, or fear for her safety at the scene.

We conclude that Lee failed to demonstrate good cause for his failure to file a timely motion. The grounds upon which Lee’s motion to suppress were based were known to him throughout the time his case was pending in the district court. Appellant merely contended that the report showed that there was a lack of information regarding Lee or danger at the scene, provided at the time of dispatch, upon which the officers could rely to base their determination of reasonable suspicion to conduct a pat-down search of Lee. However, as the record indicates that the State had not put forth any evidence concerning the contents of the 911 call or dispatch report as they related to Lee, Lee could have raised such a motion based on the lack of information supporting the pat-down search at any time in the proceedings. Moreover, Lee did not include an affidavit with the motion as required by NRS 174.125(4). Therefore, the district court did not abuse its discretion in denying Lee’s motion as untimely.

To the extent that Lee argues that the search was not reasonable, Lee did not adequately preserve this issue for appeal and, thus, plain error review is appropriate. NRS 178.602. We conclude that

the search was reasonable and Lee failed to demonstrate plain error affecting his substantial rights.

Second, Lee argues that, because the district court granted a pretrial motion to exclude evidence that the seized gun was unregistered, the State engaged in misconduct when it solicited testimony from an officer that the firearm discovered during the search was not registered. He asserts that the district court erred in denying his motion for a mistrial.

The decision to grant or deny a motion for a mistrial is within the district court's discretion and will not be disturbed on appeal absent a clear showing of an abuse of discretion. Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996). "A witnesses's spontaneous or inadvertent references to inadmissible material, not solicited by the prosecution, can be cured by an immediate admonishment directing the jury to disregard the statement." Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005).

We conclude that the district court did not abuse its discretion by denying Lee's motion for a mistrial. The comments were not intentionally solicited by the State and were not clearly and enduringly prejudicial. Defense counsel immediately objected and the district court instructed the jury to disregard the officer's statement. Moreover, the evidence against Lee was overwhelming. Officers testified that a search of Lee revealed a firearm in his front pants pocket and appellant did not have a permit to carry a concealed weapon.

Third, Lee argues that the district court erred in engaging in ex parte communications with the jurors. He further claims the district

court erred in not recusing itself from the sentencing proceedings after meeting with the jurors.

We have recognized that contact between a judge and juror can violate a defendant's rights to counsel and to be present at all critical stages of his trial. Randolph v. State, 117 Nev. 970, 989, 36 P.3d 424, 436 (2001). The Nevada Code of Judicial Conduct permits ex parte communication where "the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication," and the judge promptly notifies the "parties of the substance of the ex parte communication and allows an opportunity to respond." NCJC Canon 3B(7)(a)(i), (ii). However, "if a trial judge enters a jury room and communicates with deliberating jurors on a subject relevant to the case, reversal is required." State v. Graff, 96 Nev. 474, 475, 611 P.2d 196, 197 (1980).

We conclude that the district court did not err in communicating ex parte with the jurors. After the jury had rendered its verdict, the judge informed counsel that she wanted to thank the jurors privately prior to when counsel was able to speak to the panel. The jury had concluded its service and thus was not deliberating at the time that the district judge communicated with it outside the presence of counsel. Thus, Lee was not prejudiced by the communication.

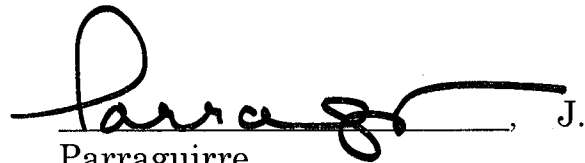
Regarding the issue of recusal, this court gives "substantial weight" to a judge's decision not to voluntarily recuse herself and will not reverse that decision absent an abuse of discretion. Kirksey v. State, 112 Nev. 980, 1006, 923 P.2d 1102, 1118 (1996) (quoting Goldman v. Bryan, 104 Nev. 644, 649, 764 P.2d 1296, 1299 (1988), abrogated on other grounds by Halverson v. Hardcastle, 123 Nev. 29, \_\_\_, 163 P.3d 428, 442-43

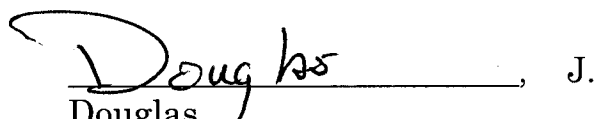
(2007)). “A judge shall not act as such in an action or proceeding when he entertains actual bias or prejudice for or against one of the parties to the action.” NRS 1.230(1). Further, under Canon 3E(1) of the Nevada Code of Judicial Conduct, “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” “The burden is on the party asserting the challenge to establish sufficient facts warranting disqualification.” Kirksey, 112 Nev. at 1006, 923 P.2d at 1118.

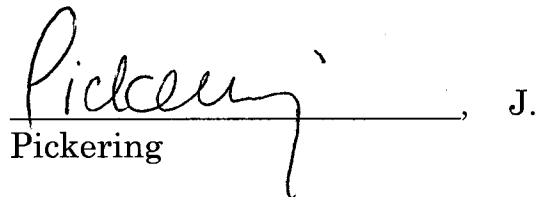
Here, Lee did not point to any evidence that indicated that Judge Leavitt could not conduct the sentencing hearing fairly. Lee did not indicate what information Judge Leavitt obtained from the private meeting with the jurors that would have affected her ability to fairly sentence him. Therefore, we conclude that Judge Leavitt did not abuse her discretion in not recusing herself from the sentencing proceedings.

Having considered Lee’s contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

  
Parraguirre, J.

  
Douglas, J.

  
Pickering, J.

cc: Hon. Michelle Leavitt, District Judge  
Clark County Public Defender Philip J. Kohn  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk