IN THE SUPREME COURT OF THE STATE OF NEVADA

CORNELL DEWAYNE BELT,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34631

FILED

JUN 13 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of larceny from a person. The district court adjudicated appellant as a habitual criminal and sentenced him to serve five to twenty years in prison.

Appellant first argues that the district court abused its discretion by denying appellant's motion to dismiss on the grounds that the justice court's prior dismissal of the case was without prejudice. The record before us indicates that the justice court simply dismissed the case without indicating whether the dismissal was with or without prejudice. Once the charges were refiled, the district court determined that the dismissal was without prejudice because the State's conduct with respect to the delay of the original prosecution was not "willful or conscientiously indifferent." As the district court pointed out, we have held that "it is the district court [that] decides whether a prosecutor has been 'willful' or 'conscientiously indifferent' so as to be barred from instituting a second prosecution." McNair v. Sheriff, 89 Nev. 434, 438, 514 P.2d 1175, 1177 (1973) (citing Stockton v. Sheriff, 87 Nev. 94, 95, 482 P.2d 285, 286 n.1 (1971)). Further, "where the record contains a basis for finding something other than 'willful disregard' or 'conscious

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indifference,' we have upheld the district court's determination." Id. (citing Johnson v. Sheriff, 89 Nev. 304, 511 P.2d 1051 (1973). After a careful review, we conclude that the record does not reflect that the delays in the first prosecution were a result of "willful disregard" or "conscious indifference" on the part of the State. The State, exercising due diligence, was simply unable to secure the victim's presence for the preliminary hearing. Therefore, we conclude appellant's argument lacks merit.

Appellant next argues that the district court erred in denying his motion to dismiss on double jeopardy grounds. Appellant contends that the State caused a mistrial by intentionally, or in bad faith, goading the defense to move for a mistrial. We disagree.

We have held that where the prosecution goads the defense into moving for a mistrial by "harassment" or "overreaching," double jeopardy will bar reprosecution of the defendant. Melchor-Gloria v. State, 99 Nev. 174, 178, 660 P.2d 109, 112 (1983). A district court's finding that the State did not intentionally or in bad faith cause a mistrial is upheld on appeal absent clear error. Id. Here, the district court found that the State did not act in bad faith, and therefore, the Double Jeopardy Clause of the Fifth Amendment did not bar reprosecution of appellant. We conclude that the district court's findings are not clearly erroneous.

Last, appellant argues the district court erred in finding appellant had three prior felony convictions and adjudicating him a habitual criminal. Specifically, appellant argues that the district court erred in considering his two 1990 felony convictions as separate convictions for purposes of NRS 207.010. We conclude that appellant's contention is without merit.

The district court adjudicated appellant a habitual criminal after reviewing the presentence investigation report and listening to arguments from the State and appellant's counsel. It is reasonable to assume that the district court considered the arguments and report, and concluded that adjudication of appellant as a habitual criminal was just and proper. Cf. Clark v. State, 109 Nev. 426, 851 P.2d 426 (1993) (district court erred by adjudicating defendant a habitual criminal where it appeared that district court thought imposition of enhancement was mandatory, and district court therefore did not exercise any discretion in making the ruling). Further, the district court exercised its discretion and adjudicated appellant under the small habitual criminal statute, NRS 207.010(1)(a), which requires only two felony convictions, as opposed to NRS 207.010(1)(b), which requires three prior felony convictions. Therefore, we conclude appellant's argument is without merit.

Accordingly, having considered appellant's contentions and concluded they are without merit, we

ORDER this appeal dismissed.

Maupin, J.
Maupin

Shearing, J.
Shearing

Becker, J.
Becker

cc: Hon. Michael L. Douglas, District Judge
Attorney General
Clark County District Attorney
Craig A. Mueller
Clark County Clerk