IN THE SUPREME COURT OF THE STATE OF NEVADA

JESUS GONZALEZ-SOTO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51358

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of level three trafficking in a controlled substance. Second Judicial District Court, Washoe County; Janet J. Berry, Judge. Appellant Jesus Gonzalez-Soto was sentenced to life in prison with the possibility of parole after ten years. This appeal followed.

Gonzalez-Soto makes numerous arguments on appeal. We conclude that none of his contentions warrant relief.

Speedy trial

First, Gonzalez-Soto argues that excessive delay between his arrest and his trial violated his right to a speedy trial. Specifically, he argues that both pre-arraignment and post-arraignment delays violated his statutory rights to the filing of an information or indictment within 15 days of arrest and to a trial within 60 days of arraignment, and his constitutional right to a speedy trial. NRS 171.196(2); NRS 178.556(1); U.S. Const. amend VI. We conclude that Gonzalez-Soto was not denied his right to a speedy trial.

Gonzalez-Soto and his codefendant, Angel Bernal-Guerrero, were arrested on November 9, 2006. It appears from the record that the

preliminary hearing was continued multiple times because there was difficulty obtaining conflict counsel for Bernal-Guerrero.[1] After the third continuance, the State decided to forgo the preliminary hearing and proceed through a grand jury. On April 11, 2007, five months after Gonzalez-Soto's and Bernal-Guerrero's arrests, the grand jury returned an indictment against the two men, on one count each of trafficking in a controlled substance. Arraignment was set for May 15, 2007. On that date, both defendants appeared in court, but Bernal-Guerrero was still without counsel. Accordingly, arraignment was continued until June 14, 2007, to allow Bernal-Guerrero to obtain counsel. Gonzalez-Soto did not object to this continuance but specifically invoked his constitutional right to a speedy trial and statutory right to a trial within 60 days.

On June 14, 2007, Gonzalez-Soto pleaded not guilty and again invoked his right to a speedy trial. A jury trial was set to commence on August 13, 2007. On July 31, 2007, thirteen days before trial, Gonzalez-Soto filed a motion to sever, and on August 1, 2007, he filed three motions in limine.[2] Determining that a hearing on the motions was necessary, the district court sua sponte continued the trial due to its busy docket and because the State and counsel for Bernal-Guerrero required time to respond. Gonzalez-Soto offered to withdraw the motions in order to

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[1]The record before this court does not contain any orders, minutes or docket entries from the justice court; thus, the nature of the justice court proceedings is unclear. However, the State explained at a later hearing in district court that the delays were occasioned by a lack of conflict counsel for Bernal-Guerrero.

[2]Counsel for Bernal-Guerrero was not served with the motions until August 7, 2007.

preserve the August 13, 2007, trial date, but after an off-the-record discussion with counsel, the district court rescheduled the trial for September 24, 2007, without comment as to Gonzalez-Soto's offer to withdraw the motions.[3]

On September 7, 2007, the State filed a motion to continue trial for the second time. In support of its motion, the State cited the unavailability of Detective Goins, who was on medical leave. Specifically, the State asserted that although the detective was under subpoena, it was informed that he would not be attending trial because his worker's compensation benefits would be compromised if he performed any work-related duties while on leave. The district court determined that Detective Goins was medically disabled and continued trial until December 3, 2007, a period of ten weeks. In response, Gonzalez-Soto made an oral motion to dismiss the indictment based on the pre-arraignment and pretrial delays. The district court denied the motion to dismiss, and Gonzalez-Soto's trial began on December 5, 2007, six months after his arraignment, and fourteen months after his arrest.

Pre-indictment delay

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." NRS 178.556(1) allows a district court to dismiss a complaint if an

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[3]Gonzalez-Soto did not actually withdraw the motions, which were decided on August 22, 2007.

At a later hearing the district court explained that it felt it needed to consider the significant constitutional issues that were raised.

indictment or information is not filed against a criminal defendant within 15 days after arrest. This court reviews the denial of a motion to dismiss and indictment for abuse of discretion. Hill v. State, 124 Nev. ____, ____, 188 P.3d 51, 54 (2008).

The absence of counsel constitutes good cause for a continuance. Cf. Snyder v. State, 103 Nev. 275, 278-79, 738 P.2d 1303, 1305-06 (1987) (concluding that delays caused by counsel's unavailability constitute good cause for a continuance). Further, it is within the justice court's discretion to continue a proceeding based on good cause shown by one codefendant. Cf. Ex Parte Groesbeck, 77 Nev. 412, 416, 365 P.2d 491, 493 (1961) (holding that where a defendant was jointly charged with two others, the granting of a continuance for good cause shown by his codefendants was discretionary with the trial court and did not entitle defendant to be discharged because of the delay in prosecution). Accordingly, the delays in justice court caused by the apparent difficulty in obtaining conflict counsel for Bernal-Guerrero did not violate NRS 171.196(2), and the district court did not abuse its discretion in denying the motion to dismiss based on the pre-indictment delays.

Pretrial delay

NRS 178.556(1) provides that a district court may dismiss an indictment if a criminal defendant is not brought to trial within 60 days after arraignment. This rule is only mandatory where no good cause is shown in support of the delay. Anderson v. State, 86 Nev. 829, 834, 477 P.2d 595, 598 (1970).

Gonzalez-Soto argues that because he offered to withdraw his motions in limine and his motion to sever, there was no good cause for the district court to sua sponte continue the trial. However, a district court

has a duty to ensure that a trial is fair. Collier v. State, 101 Nev. 473, 477, 705 P.2d 1126, 1128 (1985), holding modified on other grounds by Howard v. State, 106 Nev. 713, 800 P.2d 175 (1990). Once Gonzalez-Soto raised constitutional concerns in his motions, it was within the district court's discretion to consider the issues, even if they had been withdrawn. Thus, the district court had good cause to continue the trial. Further, the district court did not err in continuing the trial to rule on the motions due to its congested calendar. Groesbeck, 77 Nev. at 416, 365 P.2d at 493 (explaining that a trial court may grant a continuance based on the condition of its docket, pendency of other cases or convenience of judge or jurors).

We also conclude that the district court had good cause to grant the State's motion for a second continuance. Detective Goins was a key witness whose testimony was essential to describe the large amount of methamphetamine found in the yard of Gonzalez-Soto's residence. Although a ten-week delay is not insignificant, the district court did not abuse its discretion in determining that the detective's absence provided good cause in support of a continuance. See Huebner v. State, 103 Nev. 29, 32-33, 731 P.2d 1330, 1332-33 (1987) (holding that the absence of a key police-officer witness was good cause for a continuance).

Further, as nothing in the record indicates that the State's motion was made in bad faith or solely to delay trial, we reject Gonzalez-Soto's assertion that the district court abused its discretion in granting the motion because of procedural deficiencies in the accompanying affidavit. See NRS 174.515(1) (requiring a motion for continuance to be accompanied by a supporting affidavit); DCR 14 (setting forth the procedural requirement of the affidavit); Rainsberger v. State, 76 Nev. 158, 160, 350

P.2d 995, 996 (1960) (holding that a district court may grant a motion for continuance based on a deficient affidavit so long as the motion is "made in good faith and not merely for delay"). Accordingly, we conclude that the district court did not abuse its discretion in denying Gonzalez-Soto's motion to dismiss based on violations of his statutory right to a speedy trial.

Constitutional right to a speedy trial

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend VI. The United States Supreme Court has established a four-part balancing test that a court must conduct when determining if the right to a speedy trial has been violated. Barker v. Wingo, 407 U.S. 514, 530 (1972). These factors are (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted the right, and (4) prejudice. Id. While a showing of prejudice is not essential, this court may weigh its absence more heavily than other factors. State v. Fain, 105 Nev. 567, 570, 779 P.2d 965, 967 (1989).

In order to trigger a speedy trial analysis, a defendant must show that any delay is of sufficient duration to be considered "presumptively prejudicial." Barker, 407 U.S. at 530-32. Although there is no bright line rule, delays approaching one year are presumptively prejudicial.[4] Doggett v. United States, 505 U.S. 647, 652 n.1 (1992). Here,

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[4]As discussed above, Gonzalez-Soto was not indicted within 15 days as required by NRS 171.196(2), or brought to trial within 60 days as required by NRS 178.556(1). However, this court has held that a violation of these statutes does not necessarily equate to a violation of the constitutional right to a speedy trial. See Sondergaard v. Sheriff, 91 Nev.

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the length of delay from arrest to trial was approximately fourteen months. This delay is sufficiently lengthy to warrant further inquiry into the other Barker factors.

As discussed above, the delays in this case were caused by difficulty in obtaining conflict counsel for the codefendant, the filing of several defense motions, and the unavailability of a key witness. Although the absence of counsel constituted good cause for a continuance, the delay attributed to it is charged against the State, as the State has the ultimate responsibility to bring a defendant to trial. Barker, 407 U.S. at 531. Gonzalez-Soto is charged with the delay occasioned by the filing of his pretrial motions, while the unavailability of the witness provides a neutral reason charged to neither side. Id. On balance, this factor weighs slightly in Gonzalez-Soto's favor.

Regarding the third factor, Gonzalez-Soto consistently and repeatedly asserted his right to a speedy trial from his initial arraignment through trial. Therefore, this factor weighs heavily in Gonzalez-Soto's favor.

Lastly, as to the prejudice factor, Gonzalez-Soto argues that he was prejudiced by the delay because the continuances allowed the State time to convince his codefendant to testify against him. This argument fails for two reasons. First, it is merely speculative that Bernal-Guerrero

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93, 95, 531 P.2d 474, 475 (1975). Instead, "[t]he statutory timetable for conduct of criminal proceedings is a guide to the speedy trial issue, but does not define the constitutional right." Anderson, 86 Nev. at 834, 477 P.2d at 598.

would not have agreed to testify against Gonzalez-Soto but for the continuances. See United States v. Loud Hawk, 474 U.S. 302, 315 (1986) (holding that the possibility of prejudice is insufficient to establish a violation of speedy trial rights). Second, Gonzalez-Soto makes no claim that his defense was impaired or hindered in any way. Instead, he argues only that the delay allowed the State to strengthen its case. Such a situation does not amount to prejudice. See United States v. Tedesco, 726 F.2d 1216, 1221 (7th Cir. 1984) (explaining that "'[p]rejudice' is not caused by allowing the Government properly to strengthen its case, but rather by delays intended to hamper defendant's ability to present his defense").

Considering all of the Barker factors, and in light of the increased weight given to the lack of prejudice, we conclude that Gonzalez-Soto was not denied his constitutional right to a speedy trial.

Search and Seizure

Gonzalez-Soto next argues that the district court erred in admitting the drug and gun evidence seized as a result of the warrantless searches of the car he was riding in and his residence. Specifically, Gonzalez-Soto contends that although his wife consented to the searches, the searches were nonetheless invalid because he was intentionally removed from the scene so that he could not object. Because Gonzalez-Soto did not object to the admission of the evidence on this basis at trial, we review this claim for plain error. NRS 178.602; Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403-04 (2001).

"A warrantless search is valid if the police acquire consent from a cohabitant who possesses common authority over the property to be searched." Casteel v. State, 122 Nev. 356, 360, 131 P.3d 1, 3 (2006) (citing Illinois v. Rodriguez, 497 U.S. 177, 181 (1990)). However, a warrantless

search is invalid despite one occupant's consent if the other occupant refuses permission to search or has been purposefully removed to avoid a possible objection. Georgia v. Randolph, 547 U.S. 103, 121 (2006).

Here, Gonzalez-Soto's wife, to whom the car was registered and to whom the house was rented, signed a consent to search form authorizing police to search the vehicle and the residence. It appears from the record that Gonzalez-Soto may have been detained on scene in a police car when his wife consented to the searches; however, there is no evidence to support the claim that he was intentionally placed there to keep him from objecting to the search. Moreover, the United States Supreme Court has specifically upheld the validity of a co-tenant's consent to search where a potentially objecting co-tenant was in a nearby squad car and was not asked for consent. United States v. Matlock, 415 U.S. 164, 177-79 (1974). Accordingly, we conclude that this claim is without merit.[5]

Apprendi violation

Gonzalez-Soto next contends that his sentence must be vacated because the jury returned a general verdict form finding him guilty of trafficking in a controlled substance but did not include a finding that he was guilty of trafficking in more than 28 grams of methamphetamine. He argues that the amount of controlled substance involved in this case should have been specifically submitted to the jury because it increased the crime of trafficking in a controlled substance from a category B felony to a category A felony.

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[5]Gonzalez-Soto also asserts that his wife's consent was involuntary. The record reveals no evidence of deceit or coercion. See Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Accordingly, we reject this claim.

"[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 476 (2000). In Nevada, the crime of trafficking in a controlled substance may be a category A felony or a category B felony depending on the amount of the controlled substance involved. In particular, an offense is a category B felony if the amount of controlled substance is less than 28 grams and a category A felony if the amount is 28 grams or more. NRS 453.3385.

We conclude that Gonzalez-Soto's contention lacks merit. The record reveals that the charging document in this case specifically charged Gonzalez-Soto with trafficking in 28 grams or more of a controlled substance pursuant to NRS 453.3385(3). Moreover, jury instruction 22 explained that a person commits the crime of level three trafficking in a controlled substance when he or she: (1) knowingly or intentionally; (2) is in actual or constructive possession; (3) of 28 grams or more; (4) of a controlled substance or a mixture which contains a schedule one controlled substance. Finally, Gonzalez-Soto did not request a jury instruction, and none were given, on lesser-included offenses. Thus, it is reasonable to infer from the record that before signing the general verdict form, which referred to the crime only as "trafficking in a controlled substance," the jury made a finding that Gonzalez-Soto was trafficking in 28 grams or more of methamphetamine. Accordingly, we conclude that Gonzalez-Soto is not entitled to a new sentencing hearing based on the jury's return of a general verdict form which did not include a finding that he was guilty of third-level trafficking or trafficking in more than 28 grams of methamphetamine.

Firearm evidence

Gonzalez-Soto next argues that the trial court erred in admitting the firearms seized from the car and from his residence. While we agree that the guns were improperly admitted, we conclude that their admission was harmless error.

At trial, the State argued that the firearm evidence was admissible under NRS 48.035(3),[6] the res gestae statute. Under this statute "a witness may only testify to another uncharged act or crime if it is so closely related to the act in controversy that the witness cannot describe the act without referring to the other uncharged act or crime." Bellon v. State, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005). Here, we conclude that police officers could have easily testified about Gonzalez-Soto's arrest, the subsequent search of his house, and the discovery of the methamphetamine without mentioning the guns. Thus, the district court erred in admitting evidence of the guns under the res gestae statute. However, we conclude that this error was harmless.

In determining whether the erroneous introduction of evidence constitutes harmless error, this court has set forth three relevant

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[6]NRS 48.035(3) provides:

> Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

considerations: "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged." Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

In this case, the admission of the firearm evidence was highly prejudicial, and Gonzalez-Soto was convicted of a class A felony, a serious offense. However, our review of the record reveals substantial evidence of Gonzalez-Soto's guilt. The cell phone found in Gonzalez-Soto's possession matched the phone number called by the confidential informant to set up a drug buy, and Gonzalez-Soto was identified by the confidential informant as the source of his drugs. Seventy baggies of methamphetamine were found in the kitchen of Gonzalez-Soto's kitchen and 900 grams were found in a lockbox outside. Although Gonzalez-Soto claimed he did not live in the residence where the drugs were found, several pieces of mail with Gonzalez-Soto's name on them were found in the residence, and a letter carrier testified that he delivered certified letters and packages to Gonzalez-Soto at that residence on an almost daily basis for the six months prior to the date of Gonzalez-Soto's arrest.

Considering each of these factors, we cannot say that the overwhelming evidence of guilt is outweighed by the prejudicial nature of the firearm evidence and the seriousness of the offense. Accordingly, we conclude that the erroneous admission of the firearm evidence was harmless error.

Impeachment of witness

Gonzalez-Soto next argues, without citation to authority, that he was denied a fair trial because the district court failed to instruct the jury on how to evaluate the testimony of the confidential informant, a convicted felon. NRS 50.095 allows the introduction of evidence that a

witness has been convicted of certain crimes in order to impeach his credibility. If requested, a district court must instruct the jury that evidence of a criminal defendant's previous conviction may only be considered on the issue of his credibility and not as substantive proof of his guilt. Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1106 (1990). However, there is no such requirement in the case of a witness who is not the criminal defendant. Moreover, Gonzalez-Soto did not request a limiting instruction. Therefore, we conclude the district court did not err in failing to so instruct the jury.

Sufficiency of evidence

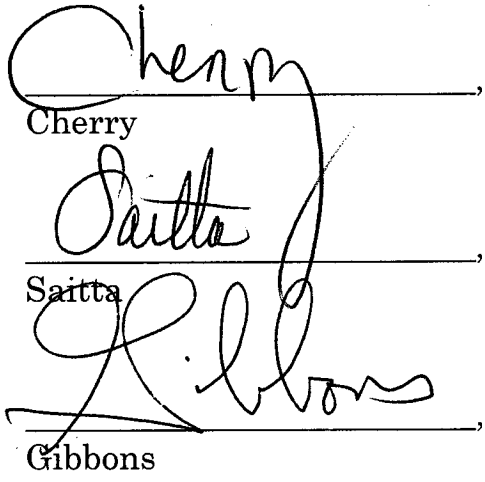
Next, Gonzalez-Soto contends that there is insufficient evidence to support his conviction. In a criminal case, the standard of review is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319, (1979)). As discussed above, substantial evidence supported Gonzalez-Soto's conviction. Accordingly, we conclude that a rational jury could have found Gonzalez-Soto guilty of trafficking in a controlled substance beyond a reasonable doubt.

Cumulative error

Finally, Gonzalez-Soto argues that cumulative errors warrant the reversal of his conviction. Cumulative errors below may justify a new trial even if the errors, standing alone, are harmless. See, e.g., Byford v. State, 116 Nev. 215, 241-42, 994 P.2d 700, 717 (2000). Here, the district court erred only in admitting evidence of the firearms, and this error was harmless. Thus, there is no cumulative error warranting relief.

Having concluded that Gonzalez-Soto's contentions lack merit, we

ORDER the judgment of conviction AFFIRMED.



Cherry, J.

Saitta, J.

Gibbons, J.

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk