


IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY IRBY,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51709

**FILED**

AUG 10 2009

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of possession of a controlled substance not for sale. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge. The district court sentenced appellant Gregory Irby to serve 12 to 32 months in prison, suspended execution of the sentence, and placed him on probation, with various conditions, for an indeterminate period not to exceed five years.

First, Irby contends that the district court erred by failing to sua sponte suppress evidence allegedly obtained in violation of his Fourth Amendment rights. Specifically, Irby contends that “because of an illegal stop, the deputy discovered the information which ultimately led to the discovery of the contraband. This is ‘fruit from the poisonous tree’ and [Supreme Court precedent] mandates suppression.”

Initially, we note that Irby raises this issue for the first time on appeal. Irby did not file a pretrial motion to suppress pursuant to NRS 174.125, and failure to make such a pretrial motion generally precludes appellate review of the issue. Hardison v. State, 84 Nev. 125, 128, 437 P.2d 868, 870 (1968). This court may nevertheless address an alleged

error if the error was plain and affected the appellant's substantial rights. NRS 178.602. "In conducting plain error review, we must examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights." Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)). To establish that his substantial rights were affected, the appellant bears the burden of showing that the error was prejudicial. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

Irby contends that an illegal pat-down search led to the discovery of an outstanding warrant for his arrest, and he argues that the district court erred by failing to sua sponte suppress the methamphetamine found on his person during the search conducted incident to the arrest. We disagree. No evidence was found or seized as a result of the pat-down search conducted at about 3:30 a.m. It was not until about 8:30 a.m. that same day that the officer relocated Irby and arrested him. Once the officer made a custody arrest of Irby pursuant to a valid warrant, he had authority to effect a full search and any contraband seized from Irby's person during the search was properly admitted into evidence. Lightford v. State, 90 Nev. 136, 138, 520 P.2d 955, 956 (1974). Irby has failed to demonstrate reversible plain error. Accordingly, we conclude that the district court did not err by failing to sua sponte suppress this evidence.

Second, Irby contends that his due process rights were violated by the State's destruction of exculpatory evidence. Specifically, Irby argues that the State destroyed the appearance of the original

controlled substance found in his possession by making the amount of the residue appear larger.

“The State’s loss or destruction of evidence constitutes a due process violation only if the defendant shows either that the State acted in bad faith or that the defendant suffered undue prejudice and the exculpatory value of the evidence was apparent before it was lost or destroyed.” Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001). “Where there is no bad faith, the defendant has the burden of showing prejudice” by demonstrating that “it could be reasonably anticipated that the evidence sought would be exculpatory and material to [the] defense.” Id. (internal citations omitted) (alteration in original). “It is not sufficient to show merely a hoped-for conclusion or that examination of the evidence would be helpful in preparing [a] defense.” Id. (internal quotation marks omitted) (alteration in original).

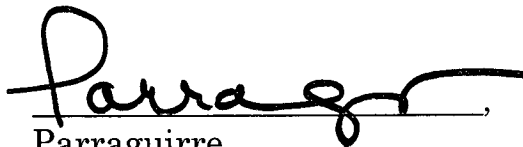
The criminologist testified that the amount of methamphetamine in the tiny plastic bag found on Irby’s person was very small, too small even to weigh, and she returned the residue without removing it from the test tube after completion of forensic testing. The evidence package was crushed in the mail and the pulverized glass from the test tube was mixed in with the remaining methamphetamine residue. Irby contends that the small amount of methamphetamine found on his person is exculpatory and he was prejudiced because the pulverized glass created the appearance that the amount of methamphetamine found in his possession was much greater than it was. We disagree.

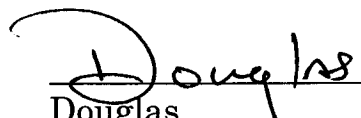
Irby has not demonstrated either that the State acted in bad faith or that he was prejudiced when the evidence bag was crushed in transit. Additionally, he has not shown that the small amount of


methamphetamine contained in the tiny plastic bag found on his person had exculpatory value. "The amount of a controlled substance needed to sustain a conviction . . . is that amount necessary for identification as a controlled substance by a witness qualified to make such identification." NRS 453.570. Here, the jury heard evidence regarding the extremely small amount of methamphetamine found on Irby's person and how the evidence bag came to contain pulverized glass. The defense thoroughly explored these issues during cross-examination of the criminalist who performed the tests and confirmed the presence of methamphetamine. Accordingly, we conclude that Irby's due process rights were not violated by the destruction or loss of any exculpatory evidence.

Having considered Irby's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

  
Parraguirre, J.

  
Douglas, J.

  
Pickering, J.

cc: Hon. Steve L. Dobrescu, District Judge  
State Public Defender/Carson City  
Attorney General Catherine Cortez Masto/Carson City  
White Pine County District Attorney  
White Pine County Clerk