

IN THE SUPREME COURT OF THE STATE OF NEVADA

CHRISTOPHER LEE ALLEN A/K/A
CHRISTOPHER ALLEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51783

FILED

AUG 06 2009

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
DEPUTY CLERK

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Michael Villani, Judge. The district court sentenced appellant Christopher Lee Allen to serve a prison term of 19 to 48 months.

Allen contends that he was denied his right to a fair trial by the State's failure to preserve evidence. Allen specifically claims that a police officer's failure to place an impounded firearm into an evidence bag made it impossible for the forensic laboratory to process the firearm for latent fingerprints that could have exculpated him. Allen argues that the police officer acted in bad faith as evidenced by the following testimony:

[Prosecutor] And what were the results of that forensic analysis?

[Forensic Lab Manager] Apparently when these items were brought to our vault they had a tag that were put -- that was put onto them and they were not packaged. So when that happens, that means that everyone in our vault handles that item without gloves; there's no protection, the

item's not preserved in any way to protect any latent print evidence that's on it.

So when we find out at the laboratory that the item was not protected to actually keep that evidence intact, we do not process it because you're liable to get latent prints from whoever at the -- you know, at the evidence vault, Metro employees at that time.

So we did not process those items because they had been handled by, you know, innumerable people at the evidence vault.

The State's duty to preserve evidence attaches when the State obtains possession and control of the evidence. See Steese v. State, 114 Nev. 479, 491, 960 P.2d 321, 329 (1998) (citing March v. State, 859 P.2d 714, 716 (Alaska Ct. App. 1993)). "Loss or destruction of evidence by the State violates due process '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.'" Daniel v. State, 119 Nev. 498, 520, 78 P.3d 890, 905 (2003) (quoting Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001)). "To establish prejudice, the defendant must show that it could be reasonably anticipated that the evidence would have been exculpatory and material to the defense." Id. (quoting Cook v. State, 114 Nev. 120, 125, 953 P.2d 712, 715 (1998)). Evidence is "material" if there is "a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different." Klein v. Warden, 118 Nev. 305, 313, 43 P.3d 1029, 1035 (2002) (quoting Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998)). If the defendant establishes that the loss of evidence violated his due process rights, then he is entitled either to a reversal of his conviction or a jury instruction regarding a conclusive

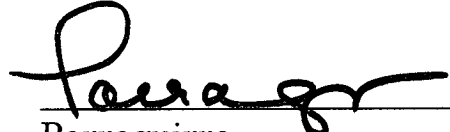
presumption that the evidence was exculpatory to the defense. Cook, 114 Nev. at 126, 953 P.2d at 716 (reversing the conviction); Daniel, 119 Nev. at 521, 78 P.3d at 905 (discussing jury instruction with presumption in favor of defendant).

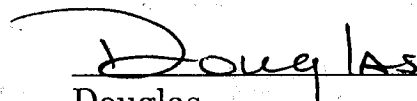
Here, Officer Donald Cox testified that he retrieved a handgun in a nylon holster from the floorboard of a car. Officer Howard Crosby testified that he cleared the handgun by removing the magazine, locking the slide to the rear, inspecting the chamber for ammunition, and running a zip tie through the magazine well to render the handgun safe. Officer Crosby further testified that the handgun was tagged with his initials, badge number, and event number. Officer Crosby did not ask forensics to fingerprint the handgun; he testified that that request may have come from the District Attorney's Office. Forensic Lab Manager Alice Maceo testified that a nylon holster would not be a good surface for finding latent prints, handling an object with a fabric or a paper towel would prevent finding latent prints, and the lab usually gets at least one useable latent print in about 45 percent of the cases where it processes several items of evidence. During closing argument, Allen argued that there was no physical evidence that he possessed the handgun and noted that the handgun was not tested for latent prints because it was not appropriately handled by law enforcement.

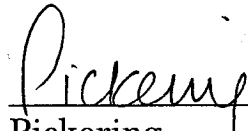
Under these circumstances, we conclude that Allen has not demonstrated that the police officer's failure to place the impounded handgun into an evidence bag constituted an act of bad faith, see Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001) (providing that "[i]n a criminal investigation, police officers generally have no duty to collect all potential evidence"), nor has Allen shown a reasonable

probability that the trial result would have been different if fingerprint evidence from the handgun had been presented to the jury. Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Pickering

cc: Hon. Michael Villani, District Judge
John P. Parris
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk