

IN THE SUPREME COURT OF THE STATE OF NEVADA

DANIEL THOMAS GELZAINES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52970

FILED

JAN 08 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [Signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of felony driving under the influence. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge.

First, Gelzaines contends that the constitutional prohibition against double jeopardy was violated when he was retried after his first trial ended in a mistrial. See U.S. Const. amend. V; Nev. Const. art. 1, § 8. The district court conducted a hearing and found that the State did not engage in harassment or intend to goad Gelzaines into moving for a mistrial and therefore the Double Jeopardy Clause did not prohibit his retrial. See Oregon v. Kennedy, 456 U.S. 667, 675-76 (1982) (“Only where the governmental conduct in question is intended to ‘goad’ the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.”); Melchor-Gloria v. State, 99 Nev. 174, 178, 660 P.2d 109, 111-12 (1983) (“As a general rule, a defendant’s motion for, or consent to, a mistrial removes any double jeopardy bar to prosecution.”). We conclude that the district court’s findings were not clearly erroneous. See Melchor-Gloria, 99 Nev. at 178, 660 P.2d at 112.

Second, Gelzaines contends that his right to a speedy trial was violated when his second trial began more than 60 days after his arraignment. See NRS 178.556(1); see also U.S. Const. amend. VI. The district court found that Gelzaines failed to demonstrate that he was prejudiced by the brief delay. See Barker v. Wingo, 407 U.S. 514, 530 (1972) (assessing claim that defendant has been deprived of his constitutional right to a speedy trial, the court must weigh four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant). We conclude that the length of the delay in this case is not presumptively prejudicial and that further inquiry into the other Barker factors is not warranted. See id. at 530; see also 174.511(2) (court may postpone a criminal trial beyond the sixty-day limit if "[t]he number of other cases pending in the court prohibits the acceptance of the case for trial within that time"); Ex Parte Hansen, 79 Nev. 492, 495-96, 387 P.2d 659, 66061 (1963) (court not required to dismiss charges pursuant to NRS 178.556(1) when delay not oppressive and the court properly considered the condition of its calendar and the pendency of other cases in setting the trial date). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

1. Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

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