IN THE SUPREME COURT OF THE STATE OF NEVADA

FIDEL LUIS FUENTES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53585

FILED

MAR 11 2010

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 trafficking in a controlled substance. First Judicial District Court, Carson City; James E. Wilson, Judge.

Motion to Suppress

Appellant Fidel Luis Fuentes contends that the district court erred in denying his motion to suppress evidence of the methamphetamines found on his person during a lawful patdown search because it was not "immediately apparent" to the officer that the baggie contained methamphetamines. See Minnesota v. Dickerson, 508 U.S. 366, 379 (1993) (holding that because the incriminating character of contraband discovered during patdown search was not immediately apparent to the officer, any further search of the defendant's pocket was constitutionally invalid, and the seizure of the contraband was likewise unconstitutional). We disagree. The officer who conducted the patdown search of Fuentes testified that he seized the object from Fuentes' waistband after Fuentes told him that the object was "cut" and consented to a test of the substance. See State v. Ruscetta, 123 Nev. 299, 302-03, 163 P.3d 451, 454 (2007) (providing that free and intelligent consent

exempts a search and seizure from both probable cause and warrant requirements). There is nothing in the record to refute the officer's testimony regarding consent, or the district court's finding that the officer obtained consent to seize the item from Fuentes' waistband. As such, the district court did not err in rejecting Fuentes' motion to suppress.

The removal of a juror

Fuentes maintains that the district court erred in dismissing a juror because there was no good cause for the dismissal. Because Fuentes did not object to the juror's dismissal, we review for plain error. See Higgs v. State, 126 Nev. ___, ___, 222 P.3d 648, 662 (2010). We conclude that that no plain error occurred and no relief is warranted because the juror in question informed the trial court that she could no longer be impartial. Additionally, Fuentes acknowledged the juror's lack of impartiality and that it was proper for the court to dismiss the juror. See NRS 16.080 (providing that "[a]fter the impaneling of the jury and before verdict, the court may discharge a juror upon a showing of . . . any . . . inability to perform [her] duty"); McKenna v. State, 96 Nev. 811, 813, 618 P.2d 348, 349 (1980) (holding that "[a] juror who will not weigh and consider all the facts and circumstances shown by the evidence for the purpose of doing equal and exact justice between the State and the accused should not be allowed to decide the case").

Fuentes' sentencing

Fuentes asserts that the district court may have improperly considered his gang affiliation in imposing a sentence. Because Fuentes did not object to any mention of his gang affiliation at sentencing, we review for plain error. See Higgs, 126 Nev. at ___, 222 P.3d at 662. We find no plain error because nothing in the record indicates that the court

imposed the sentence solely based on the prosecutor's comments about Fuentes' gang affiliation. See Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) ("Few limitations are imposed on a judge's right to consider evidence in imposing a sentence, and courts are generally free to consider information extraneous to the pre-sentencing report. . . . Further, a sentencing proceeding is not a second trial, and the court is privileged to consider facts and circumstances that would not be admissible at trial" and "this court will reverse a sentence if it is supported solely by impalpable and highly suspect evidence." (citations omitted)).

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

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. James E. Wilson, District Judge
Kay Ellen Armstrong
Attorney General/Carson City
Carson City District Attorney
Carson City Clerk