IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE EARL RUDD, JR. A/K/A WILLIE RUDD-EL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54221

FILED

JUL 15 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 one count each of possession of a controlled substance and being under the influence of a controlled substance. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

Sufficiency of the evidence

Appellant Willie Earl Rudd, Jr., contends that insufficient evidence was adduced to support the jury's verdict. We disagree. When viewed in the light most favorable to the State, the evidence is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). Trial testimony indicated that more than an ounce of marijuana was seized from Rudd's residence. Rudd informed the investigating officers that the marijuana belonged to him. A urinalysis obtained from Rudd proved the presence of THC. Rudd testified at trial that he smoked marijuana "probably" the day of the search and arrest or the night before. It is for the jury to determine the weight and credibility to give conflicting testimony, and a jury's

verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See NRS 453.336(1); NRS 453.411(1); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (circumstantial evidence alone may sustain a conviction).

Motions to suppress

First, Rudd contends the district court erred by denying his motion to suppress evidence of his marijuana use because the potted marijuana plant found in his residence was not "open and obvious" and, therefore, the State exceeded its authority under the search warrant to subsequently obtain a urine sample. We review the district court's factual findings regarding suppression issues for clear error and review the legal consequences of those findings de novo. Somee v. State, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008). At a hearing on the motion, Detective Chris Aker testified that while "gazing around" the living room of Rudd's residence, he "just happened to notice up in a windowsill" a small, potted plant that proved to be marijuana. The district court found that the plant was discovered "in an open area" of the residence and "was obvious to the detectives," therefore allowing them to request a urine sample from Rudd. We agree and conclude that the district court did not err.

Second, Rudd contends the district court erred by denying his motion to suppress because the "daytime only" search warrant was executed after dark. NRS 179.045(6) provides in part that a "warrant must direct that it be served between the hours of 7 a.m. and 7 p.m." NRS 179.105 states that evidence seized pursuant to a warrant will not be "suppressed in any criminal action or proceeding because of mere technical

irregularities which do not affect the substantial rights of the accused." Here, the search warrant was executed at approximately 6:30 p.m., within the statutory guidelines, and although it technically took place "after night fall," Rudd has failed to demonstrate that his substantial rights were affected in any way requiring the suppression of evidence seized during the search. Therefore, we conclude that the district court did not err by denying the motion to suppress.

Third, Rudd contends that the evidence used to secure the search warrant was illegally seized from a trash can located within the protected curtilage of the residence and, therefore, the district court erred by denying his motion to suppress evidence seized after the warrant's execution. "[A] district court's determination of whether an area is within the protected curtilage of the home presents solely a question of fact." State v. Harnisch, 113 Nev. 214, 219, 931 P.2d 1359, 1363 (1997), clarified on rehearing by 114 Nev. 225, 954 P.2d 1180 (1998); see also Somee, 124 Nev. at 441, 187 P.3d at 157-58. Detective Jason Franklin testified that the trash can containing marijuana and drug paraphernalia was found in the front of the residence and "at the edge of the driveway." The district court, while questioning defense counsel, implied that the location of the trash can indicated that it "was set out for the purpose of having it hauled away by the officials as being garbage to be abandoned." Based on these facts, we conclude that the district court did not err by denying the motion to suppress. See California v. Greenwood, 486 U.S. 35, 40-41 (1988) (discarded trash containing inculpatory items sufficiently exposed to the public with the expectation of being hauled away by a third party is not afforded Fourth Amendment protection); see also U.S. v. Dunn, 480 U.S. 294, 301 (1987) (setting forth factors to consider when resolving curtilage

questions); State v. Taylor, 114 Nev. 1071, 1077, 968 P.2d 315, 320 (1998) (recognizing that one must have an objective and subjective expectation of privacy in the place to be searched).

Fourth, Rudd contends that the district court erred by finding that his confession was voluntary and denying his motion to suppress. The district court's factual findings regarding the circumstances surrounding a confession are entitled to deference which we review for clear error; however, we review the court's ultimate voluntariness determination de novo. Rosky v. State, 121 Nev. 184, 190-91, 111 P.3d 690, 694 (2005). Here, the district court conducted a hearing and made extensive findings, see Dewey v. State, 123 Nev. 483, 492, 169 P.3d 1149, 1154-55 (2007), and our review of the record reveals that the district court did not err by denying Rudd's motion to suppress his confession.[1]

Motions to dismiss

First, Rudd contends that his right to a speedy trial was violated because the trial began approximately five weeks beyond the sixty-day limit imposed by NRS 178.556(1). We review a district court's decision to deny a motion to dismiss for an abuse of discretion. See Hill v. State, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008). Here, the district court properly considered the factors set forth in Barker v. Wingo, 407 U.S. 514, 530 (1972), found that Rudd failed to demonstrate that he was prejudiced by the brief delay, and denied his motion to dismiss. We agree and conclude that the district court did not err by denying Rudd's motion to dismiss. See Ex Parte Hansen, 79 Nev. 492, 495-96, 387 P.2d 659, 660-61

[1]We also note that when Rudd was later cross-examined at trial, he conceded that his confession was voluntary.

(1963) (court not required to dismiss charges pursuant to NRS 178.556(1), formerly codified as NRS 178.495, when delay not oppressive and the court properly considered, among other things, the condition of its calendar).

Second, Rudd contends that the district court erred by denying his motion to dismiss the charges because his use of marijuana was "religious or cultural" and therefore, citing to Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006), he could not be prosecuted for possessing or using the drug. In Gonzales, it was determined that the defendant's right to use a hallucinogenic plant during religious services could not be abridged under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (RFRA), absent a compelling governmental interest given effect through the least restrictive means necessary. Gonzales, 546 U.S. at 428-29. A defendant, however, may only invoke RFRA if his beliefs are rooted in his religion and are not secular or philosophical. See U.S. v. Zimmerman, 514 F.3d 851, 853 (9th Cir. 2007). In his motion, Rudd claimed that his use of marijuana was "cultural." At the hearing on the motion, the district court found that Rudd failed to present evidence and establish that his use of marijuana was religious and noted that Rudd even denied during his testimony that its use was part of his religious practice. Therefore, we conclude that the district court did not abuse its discretion by denying the motion to dismiss. See Hill, 124 Nev. at 550, 188 P.3d at 54.[2]

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[2]Based on the district court's findings, we further conclude that the court did not err by rejecting Rudd's proposed instruction advising the jury to acquit, pursuant to Gonzales, 546 U.S. 418, if they found that his

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Right to self-representation

Rudd contends that the district court erred by denying him the right to represent himself. We review the district court's decision to deny a motion for self-representation for an abuse of discretion. See Gallego v. State, 117 Nev. 348, 362, 23 P.3d 227, 236-37 (2001). Here, the district court conducted a thorough canvass pursuant to Faretta v. California, 422 U.S. 806 (1975) and SCR 253, after which Rudd informed the court that he would reconsider his motion and allow the public defender to continue representing him. When the matter of self-representation was raised again at a later pretrial hearing, the district court specifically found that Rudd was uncooperative, unfamiliar with and unlikely to abide by the rules and procedures of the court, and denied the motion. The record supports the district court's findings. See Gallego, 117 Nev. at 361, 23 P.3d at 236. Therefore, we conclude that the district court did not abuse its discretion.

Pretrial habeas petition

Rudd contends that the district court erred by denying his motion for leave to file an untimely pretrial petition for a writ of habeas corpus. The district court has discretion to allow an untimely petition upon a showing of good cause. See NRS 34.700(3); see also NRS 34.700(1)(a). At the hearing on the motion, defense counsel informed the

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marijuana use was religious or cultural. See Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) ("The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error.").

district court that Rudd "did not give [him] permission" and "objected" to the filing of a pretrial habeas petition. Our review of the record reveals that Rudd failed to demonstrate good cause in support of his motion. Therefore, we conclude that the district court did not abuse its discretion in denying the motion.

Cruel and unusual punishment

Rudd contends that the district court abused its discretion by imposing a prison term disproportionate to the offense thus constituting cruel and unusual punishment. See U.S. Const. amend. VIII. This court will not disturb a district court's sentencing determination absent an abuse of discretion. Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). Rudd has not alleged that the district court relied on impalpable or highly suspect evidence or that the relevant sentencing statutes are unconstitutional. See Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996); Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Further, Rudd's sentence falls within the parameters provided by the relevant statutes. See NRS 193.130(2)(e); NRS 453.336(2)(a); NRS 453.411(3)(a). Therefore, we conclude that the district court did not abuse its discretion at sentencing.

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

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Michael Montero, District Judge
Humboldt County Public Defender
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk