IN THE SUPREME COURT OF THE STATE OF NEVADA

LYLE GEARHART OLEN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35085

FILED

JUL 05 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of sale of controlled substance. The district court sentenced appellant to 12 to 48 months in prison.[1]

Appellant first contends that the district court erred in denying his pretrial petition for a writ of habeas corpus. In particular, appellant contends that he should not have been bound over for trial on two counts of trafficking in a controlled substance because the counts involved the same transaction or offense. We disagree.

NRS 453.3385 provides that it is unlawful for any person to knowingly or intentionally sell or be in actual or constructive possession of a schedule I controlled substance. In this case, appellant originally was charged with one count of trafficking in a controlled substance for selling a quarter ounce of methamphetamine to a confidential informant and one count of trafficking in a controlled substance for possession of approximately 8 grams of methamphetamine found in appellant's shirt pocket at the time of his arrest. We conclude that under these circumstances, appellant could be

[1]As part of the plea negotiations, appellant reserved his right to appellate review of the issues raised herein.

charged and convicted of two counts of trafficking--one for the sale and one for possession of the remaining methamphetamine--because the narcotic possessed was separate and distinct from that sold. See Talancon v. State, 97 Nev. 12, 621 P.2d 1111 (1981); Fairman v. State, 83 Nev. 137, 425 P.2d 342 (1967).

Appellant next contends that the district court erred in denying his motion to dismiss the charges following the district court's decision to grant appellant's motion for a mistrial. Again, we disagree.

"As a general rule, a defendant's motion for, or consent to, a mistrial removes any double jeopardy bar to reprosecution." Melchor-Gloria v. State, 99 Nev. 174, 178, 660 P.2d 109, 111 (1983). An exception to this general rule applies in "those cases in which the prosecutor intended to provoke a mistrial or otherwise engaged in 'overreaching' or 'harassment.'" Id. at 178, 660 P.2d at 112 (quoting Oregon v. Kennedy, 456 U.S. 667, 681 (1982) (Stevens, J., concurring)). "Further, prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." Id.

In determining whether the prosecutor's conduct under the circumstances of the instant case constitutes "overreaching" or "harassment" intended to goad appellant into moving for a mistrial, we note that the trial court came to the conclusion that there was no prosecutorial overreaching. The court made the express finding there was no intentional conduct on the part of the prosecutor that could be classified as bad faith. The trial court also found that the prosecutor was not guilty of gross negligence. These findings of fact

must be sustained on appeal unless they are clearly erroneous. See Melchor-Gloria, 99 Nev. at 178, 660 P.2d at 112. Our review of the record convinces us that the trial court's findings are not clearly erroneous and therefore should be sustained on appeal. Accordingly, we conclude that there was no double jeopardy prohibition to retrying appellant.

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

ORDER this appeal dismissed.

Maupin, J.

Shearing, J.

Becker, J.

cc: Hon. J. Michael Memeo, District Judge
Attorney General
Elko County District Attorney
Elko County Public Defender
Elko County Clerk