

IN THE SUPREME COURT OF THE STATE OF NEVADA

CARL STEVEN BLAKE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56877

FILED

SEP 14 2011

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of lewdness with a child under fourteen years of age. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Appellant Carl Steven Blake claims cumulative error arising from the denial of his pretrial petition for a writ of habeas corpus, the conduct of a second preliminary hearing for the same offense, and a violation of double jeopardy based on simultaneous prosecutions for the same offense and the district court's decision to proceed to trial on a second information before retrying Blake on the first information after mistrial.

The denial of Blake's pretrial petition for a writ of habeas corpus did not affect his trial. Had the court granted the petition, it would not have prevented the State from filing the second information upon which Blake was subsequently convicted. See Grant v. Sheriff, 95 Nev. 211, 212, 591 P.2d 1145, 1146 (1979) (citing McGee v. Sheriff, 86 Nev. 421, 470 P.2d 132 (1970) (explaining that release on habeas corpus does not preclude the State from filing new charges)).

Blake alleges that the justice court conducted a second preliminary hearing for the same offense in excess of its jurisdiction.

However, Blake has failed to explain how the second preliminary hearing prejudiced his defense at trial. Furthermore, Blake neither objected to the second preliminary hearing nor exercised his statutory right to waive the hearing. See NRS 171.196 (granting the defendant the right to waive a preliminary examination); see also Overton v. State, 78 Nev. 198, 201, 370 P.2d 677, 679 (1962) (explaining that by proceeding to trial upon the merits without raising any objection to justice court proceedings, defendant “waive[s] any irregularities which might have occurred therein”). Therefore, we find no error.

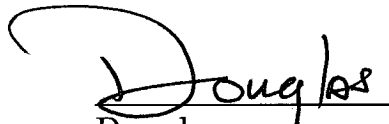
The district court did not err by denying Blake’s motion to dismiss the second information and proceeding to trial while Blake’s first case was still pending after mistrial. See United States v. Haupt, 152 F.2d 771, 795 (7th Cir. 1945) (“[T]he pendency of a previous indictment is not ground[s] for quashing a second indictment.”). It was Blake’s request for a mistrial that led to the subsequent prosecution on the second information. Where “a defendant successfully seeks to avoid his trial prior to its conclusion by a motion for mistrial, the Double Jeopardy Clause is not offended by a second prosecution.” United States v. Scott, 437 U.S. 82, 93 (1978). Nor does it bar retrial based on a new charging document alleging additional facts. See United States v. Ewell, 383 U.S. 116, 124-25 (1966); see also United States v. Ball, 163 U.S. 662, 671-72 (1896). Therefore, Blake was not twice placed in jeopardy for the same offense.


Because we have rejected Blake’s assignments of error, we conclude that his allegation of cumulative error lacks merit. See U.S. v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) (“[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.”).

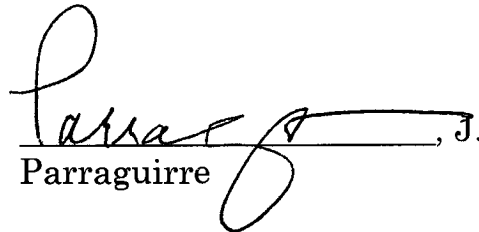
Blake also claims that he was entitled to a new trial because the State failed to disclose Giglio evidence as required by due process. The State must disclose evidence that affects the credibility of prosecution witnesses. Giglio v. United States, 405 U.S. 150, 153-55 (1972); Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000). However, the nondisclosure of Giglio evidence only justifies a retrial if the withheld information is material. Kyles v. Whitley, 514 U.S. 419, 433-34 (1995). Here, Blake has failed to show how the prior allegations of perjury against the detective would have affected the outcome of his trial. Steese v. State, 114 Nev. 479, 492, 960 P.2d 321, 330 (1998) (“Evidence is material when there is a reasonable probability that had the evidence been available to the defense, the result of the proceeding would have been different.”). The detective’s complete interview eliciting Blake’s confession was captured on video and shown to the jury. Accordingly, we conclude that the nondisclosure of the perjury allegations did not undermine confidence in the outcome of Blake’s trial.

Having considered Blake’s arguments and concluded that they lack merit we

ORDER the judgment of conviction AFFIRMED.

 _____, J.
Douglas

 _____, J.
Hardesty

 _____, J.
Parraguirre

cc: Hon. Robert W. Lane, District Judge
Gibson & Kuehn
Nye County District Attorney
Attorney General/Carson City
Nye County Clerk