IN THE SUPREME COURT OF THE STATE OF NEVADA

OTILIO GALARZA GONZALEZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35744

FILED

SEP 07 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY

CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Appellant Otilio Galarza Gonzalez was convicted, pursuant to a jury verdict, of one count of possession of a controlled substance for the purpose of sale and sentenced to a six-year term of imprisonment. The basis for his conviction was the police recovery of marijuana from his duffel bag following a drug interdiction bus stop and search in Elko.

On appeal, Gonzalez contends that the district court erred in denying his motion to suppress the marijuana because: (1) the district court erroneously concluded that Gonzalez had abandoned the duffel bag; (2) any abandonment was involuntary because Gonzalez was subjected to an improper seizure due to the fact that it was unduly coercive; and (3) any consent to search the duffel bag was involuntary because of the presence of a narcotics dog outside of the bus. Gonzalez also contends that the district court erred in failing to grant his motion to dismiss because the acquittal on simple possession and conviction on possession for the purpose of sale were inconsistent and violated double jeopardy. We conclude that none of these assignments of error has merit, and accordingly we affirm the judgment of conviction.

Gonzalez's first contention is that the district court erroneously concluded that he expressly disclaimed

ownership of a duffel bag in which the marijuana was found.[1] We will not disturb the district court's factual findings in a suppression hearing as long as they are supported by substantial evidence.[2] This court reviews de novo whether consent to search an item was voluntary.[3] Courts also review de novo whether an item has been abandoned and whether an improper seizure invalidates such a finding of abandonment[4]

Voluntarily abandoned property is not subject to Fourth Amendment protections and a defendant lacks standing to challenge the propriety of a search or seizure of that property.[5] Abandonment occurs when a reasonable person objectively relinquishes his privacy interests in an object by an express disclaimer of ownership.[6] This may be by verbal disclaimers and/or physical relinquishment of ownership.[7]

In State v. Taylor, this court focused its inquiry on the issue of abandonment on whether a person had relinquished his reasonable expectation of privacy in the property.[8] This was determined, based on the totality of the circumstances, by looking at the person's words, acts and other objective facts in order to infer intent.[9] Silence has

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[1]The parties do not contest on appeal that the duffel bag was Gonzalez's for purposes of his conviction.

[2]State v. Harnisch, 113 Nev. 214, 219, 931 P.2d 1359, 1363 (1997).

[3]State v. Taylor, 114 Nev. 1071, 1078, 968 P.2d 315, 321 (1998).

[4]See U.S. v. Gonzales, 979 F.2d 711, 712 (9th Cir. 1992); see U.S. v. Stephens, 206 F.3d 914, 917 (9th Cir. 2000).

[5]State v. Lisenbee, 116 Nev. __, __, 13 P.3d 947, 951 (2000).

[6]Taylor, 114 Nev. at 1077-78, 968 P.2d at 320.

[7]Stephens, 206 F.3d at 917.

[8]114 Nev. at 1078, 968 P.2d at 320 (quoting United States v. Jackson, 544 F.2d 407, 409 (9th Cir. 1976)).

[9]Id.

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been held to be sufficient in some instances, particularly when an officer asks an entire bus whether a particular bag belongs to anyone.[10] Other factors pertinent to this inquiry are where the bag is located on the bus, the person's physical acts with respect to the bag, and the number of times ownership is disclaimed.[11]

The evidence submitted at the preliminary hearing substantially supports the district court's conclusion that Gonzalez expressly disclaimed ownership in the duffel bag. Investigator Craig Ronzone asked Gonzalez if he had any luggage on board, and Gonzalez responded that he did not. Ronzone then asked Gonzalez if the bag lying under his seat was his, to which Gonzalez again responded no. Ronzone then removed the bag from under the seat, raised it above his head, and asked the entire bus if the bag belonged to anyone. Neither Gonzalez nor any other passenger claimed the bag. Only after these inquiries did Ronzone search the bag and find the marijuana. Gonzalez's multiple denials of ownership constitute a clear and explicit disclaimer of ownership sufficient to render the bag abandoned. Thus, we conclude

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[10]See, e.g., U.S. v. Hernandez, 7 F.3d 944 (10th Cir. 1993); U.S. v. Lewis, 921 F.2d 1294 (D.C. Cir. 1990); U.S. v. Medina, 41 F. Supp. 2d 1191 (E.D. Wa. 1998); cf. Stanberry v. State, 684 A.2d 823 (Md. 1996).

[11]See, e.g., U.S. v. Guapi, 144 F.3d 1393 (11th Cir. 1998); U.S. v. Tugwell, 125 F.3d 600 (8th Cir. 1997); U.S. v. Garzon, 119 F.3d 1446 (10th Cir. 1997); Gonzales, 979 F.2d 711; United States v. Kendall, 655 F.2d 199 (9th Cir. 1981); U.S. v. Barrett, 976 F. Supp. 1105 (N.D. Ohio 1997); Taylor, 114 Nev. at 1077-78, 968 P.2d at 321.

In Bond v. United States, 529 U.S. 334 (2000), the United States Supreme Court further held that a police officer's squeezing of bags in overheard bins on a bus did not violate the Fourth Amendment. In so concluding, the Court stated that because bags located in the overhead container were inherently subject to other passengers' touching the bags or moving them around, any privacy interest was diminished, and a police officer's squeezing of the bag was no more intrusive than the normal passenger contact with that bag.

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that the district court did not err in finding the bag abandoned.

We also conclude that there is no evidence of coercion or an improper seizure that would render the abandonment involuntary. Abandonment may be rendered invalid if it is done involuntarily, such as under coercive conditions or as a result of an improper seizure.[12]

In Florida v. Bostick, the United States Supreme Court concluded that bus stops that are part of a routine drug interdiction stop are not automatically seizures under the Fourth Amendment.[13] This court applied Bostick in Stevenson v. State.[14] In Stevenson and Bostick, both courts stated that if the police conduct conveyed the message that compliance with requests to answer questions and consent to luggage searches was mandatory, the stop was considered a seizure.[15] In Bostick, the United States Supreme Court concluded that the inquiry for reasonableness was whether a reasonable innocent person would feel free to decline the officers' requests or terminate the encounter.[16] Factors to be considered were the police officers' conduct, whether they informed passengers they had a right to refuse searches and questioning and whether their physical presence on the bus indicated that passengers could refrain from consenting.[17] However, the failure to inform a passenger of his right to refuse to answer questions or consent to a search, although indicative of

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[12]Jackson, 544 F.2d at 409-10; Stephens, 206 F.3d at 917.

[13]501 U.S. 429 (1991).

[14]114 Nev. 674, 961 P.2d 137 (1998).

[15]Bostick, 501 U.S. at 434-35; Stevenson, 114 Nev. at 679, 961 P.2d at 139-40.

[16]501 U.S. at 438.

[17]Id. at 438-39; Stevenson, 114 Nev. at 679, 961 P.2d at 139-140.

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reasonable person's beliefs, does not automatically render the stop a seizure.[18]

The evidence adduced at the preliminary hearing indicates nothing suggestive or coercive about the stop in Elko. The officers were not wearing uniforms or weapons. Moreover, the officers did not corner Gonzalez or in any way appear to coerce him into abandoning his duffel bag or consenting to a search. Even though the officers did not inform Gonzalez of his right to refuse to answer questions, this does not render the questioning a seizure.

Gonzalez claims that because this stop was the second of this particular bus within 200 miles, it created an atmosphere of coercion sufficient to render the stop an improper seizure.[19] We disagree. Although it is unclear whether the officers asked questions of several passengers or just Gonzalez in Elko, the evidence supports the conclusion that the officers did not engage in physical or verbal conduct that was coercive and were merely asking questions. In addition, the officers would have had reasonable suspicion under Terry v. Ohio[20] to justify asking Gonzalez questions, since another bus passenger, who was arrested in Winnemucca, had said that a person matching the description of Gonzalez was carrying marijuana. Because the bus was en route to Salt Lake City, this would have been sufficient exigent circumstances to justify the officer's actions in this case. Thus, even if the questioning the second time rendered the stop a seizure, we conclude that it was based on sufficient suspicion so as not to be improper or unduly coercive.

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[18]Gonzales, 979 F.2d at 713; cf. U.S. v. Cuevas-Ceja, 58 F. Supp. 2d 1175, 1187 (D. Or. 1999).

[19]The bus was previously stopped in Winnemucca as part of a routine drug interdiction stop.

[20]392 U.S. 1 (1968).

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Likewise, there is no evidence that Gonzalez's disclaimer was not voluntary. Even though Gonzalez claims that the presence of a narcotics dog outside of the bus in Elko rendered any consent involuntary, there is no evidence that Gonzalez knew the dog was there.[21] Because the mere presence of narcotics dogs without the defendant's knowledge does not render consent involuntary,[22] nor is a narcotics dog sniff a seizure,[23] we conclude Gonzalez's abandonment was voluntary. Thus, we conclude that based on the totality of the circumstances, there is no evidence that Gonzalez's express disclaimer of ownership in the duffel bag was involuntary or the result of an improper seizure. Accordingly, we conclude that the motion to suppress was properly denied and we affirm the judgment of conviction.

Finally, Gonzalez claims that the district court erroneously denied his motion to dismiss because the jury's verdict of an acquittal on simple possession but a conviction on possession for the purpose of sale was inconsistent and violated double jeopardy. We disagree.

When a single statute governs the sentencing of separate offenses, a defendant cannot be convicted of both charges.[24] Likewise, if one charge is a lesser included offense of another charge, the defendant cannot be convicted

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[21]See Stephens, 206 F.3d at 918 n.3 (if the defendant had seen the narcotics dog outside the bus, it would have increased the coerciveness of the stop); but see Barrett, 976 F. Supp. at 1110 (where the record indicated that the defendant was aware of the narcotics dog's presence outside of the bus, consent was involuntary).

[22]See Stephens, 206 F.3d at 918 n.3; see also Barrett, 976 F. Supp. at 1110.

[23]United States v. Place, 462 U.S. 696 (1983); Gama v. State, 112 Nev. 833, 838, 920 P.2d 1010, 1013 (1996).

[24]Fairman v. State, 83 Nev. 137, 140-42, 425 P.2d 342, 344-45 (1967); State v. Carter, 79 Nev. 146, 150, 379 P.2d 945, 947 (1963).

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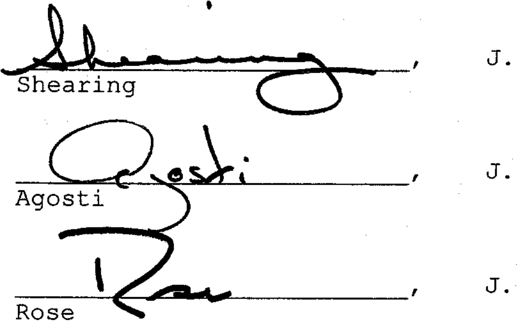
of both offenses without violating double jeopardy. An acquittal on the lesser charge but conviction on the greater charge is not an erroneous inconsistency, but rather reflects the jury's decision that the greater charge has been proven.[25]

Gonzalez's argument lacks merit predominately because the jury was apparently instructed that they could convict of simple possession or, in the alternative, possession for the purpose of sale. Because double jeopardy would have precluded a finding of guilty on both charges, and the jury was instructed that the charges were in the alternative of one another, the acquittal on the simple possession was not inherently inconsistent with the ultimate verdict.

Accordingly, having considered Gonzalez's arguments and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.



_______________, J.
Shearing

_______________, J.
Agosti

_______________, J.
Rose

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

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[25] Fairman v. State, 83 Nev. 287, 290, 429 P.2d 63, 65 (1967) (opinion on remand).

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