IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FRANKLIN OTTO SCHWATKA, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67450

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of knowing use and/or under the influence of a controlled substance. Fourth Judicial District Court, Elko County; Nancy L. Porter, Judge.

First suppression motion

Appellant Franklin Schwatka, Jr., claims the district court erred by denying his first pretrial motion to suppress evidence. Schwatka asserts the evidence was obtained as the result of an unlawful seizure of his person; even if the initial seizure was lawful, his continued seizure became unlawful when the police no longer had reasonable suspicion of criminal activity; the statements he made to a drug recognition expert were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966); and the statements he made to medical personnel were privileged under NRS 49.215.

The standard of review for Fourth Amendment and *Miranda* challenges is nearly identical; we review the district court's factual findings for clear error and the legal consequences of those factual findings de novo. *Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157-58 (2008);

Casteel v. State, 122 Nev. 356, 361, 131 P.3d 1, 4 (2006); *State v. Wilson*, 26 P.3d 1161, 1164 (Ariz. Ct. App. 2001). "The availability of a privilege is an evidentiary ruling to be determined by the trial court and reviewed on appeal for an abuse of discretion." *State v. Palubicki*, 700 N.W.2d 476, 482 (Minn. 2005).

The district court conducted an evidentiary hearing on Schwatka's suppression motion and made the following factual findings. Trooper Alan Kimbrell observed a motorcycle rider who had dropped his motorcycle on a public street. Trooper Kimbrell initially approached Schwatka to investigate the cause of the accident and Schwatka's condition. Trooper Kimbrell observed the man was "kind of jittery," his behavior was "a little off," and he smelled of alcohol. And Trooper Kimbrell began to investigate the possibility that driving under the influence caused the accident.

Nevada Highway Patrol Sergeant Anthony Munoz arrived on the scene while Trooper Kimbrell was conducting his investigation. Sergeant Munoz, a drug recognition expert, also smelled alcohol and detected evidence of methamphetamine use. Sergeant Munoz questioned Schwatka as to whether he had been drinking, if he had consumed any controlled substances, and if he thought alcohol or controlled substances had anything to do with the accident. Sergeant Munoz's questions were reasonable given the nature of the accident, Schwatka's physical appearance and mannerisms, the officers' detection of an odor of alcohol, and Schwatka's initial admission to recently drinking beers. Sergeant Munoz handcuffed Schwatka and read him his *Miranda* rights after he refused to submit to a field sobriety test.

Following his arrest, Schwatka was transported to a hospital for evaluation of his injuries and for blood and urine testing. "[Schwatka's] voluntary admission to self-medicating with marijuana was neither solicited nor provoked by any action of the officers but instead was a voluntary response made to hospital staff while the officers' proximity was visible to [Schwatka]."

The district court's factual findings are supported by the record and are not clearly wrong. We conclude from these facts that Trooper Kimbrell made a lawful inquiry stop pursuant to the community caretaking exception to the Fourth Amendment. *State v. Rincon*, 122 Nev. 1170, 1175-76, 147 P.3d 233, 237 (2006). Trooper Kimbrell's inquiry stop gave rise to a reasonable suspicion of criminal activity which justified prolonging the stop to investigate the suspicious circumstances. *State v. Beckman*, 129 Nev. ___, ___, 305 P.3d 912, 918 (2013). Sergeant Munoz's roadside questioning was reasonable and did not violate Schwatka's *Miranda* rights. *Dixon v. State*, 103 Nev. 272, 274, 737 P.2d 1162, 1164 (1987). And Schwatka failed to establish his voluntary post-arrest admission to self-medicating with marijuana was a privileged communication. *Rogers v. State*, 127 Nev. 323, 330, 255 P.3d 1264, 1268 (2011). Accordingly, the district court did not err by denying this suppression motion.

Second suppression motion

Schwatka claims the district court erred by denying his second pretrial motion to suppress evidence because the blood draw was obtained in violation of *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552 (2013) (plurality opinion). Schwatka states he raised this claim "merely to preserve it." And Schwatka concedes the blood evidence was admissible

under the Nevada Supreme Court's recent decision in *Byars v. State*, 130 Nev. ___, 336 P.3d 939 (2014).

The district court order denying Schwatka's second suppression motion was entered a year before *Byars* was decided. In *Byars*, the Nevada Supreme Court ruled a driver's consent could not be considered voluntary under the implied consent provision in NRS 484C.160(1) because the statute does not allow the driver to withdraw his or her consent, and the court concluded that NRS 484C.160(7) is unconstitutional because it "allows a police officer to engage in a warrantless nonconsensual search in violation of the Fourth Amendment." *Byars*, 130 Nev. at ___, 336 P.3d at 946. Consequently, under *Byars*, the district court could not properly find that Schwatka consented to the warrantless search under the implied consent statute.

Nonetheless, we conclude the good-faith exception to the warrant requirement applies under the facts of this case. "The record does not contradict the State's assertion that [Sergeant Munoz] relied in good faith on the constitutional validity of NRS 484C.160, and such reliance appears reasonable, as prior to *McNeely*, the U.S. Supreme Court upheld the constitutionality of warrantless blood draws under the exigent circumstances exception to the warrant requirement." *Id.* at ___, 336 P.3d at 947. Accordingly, we affirm the district court order denying this suppression motion. *See Wyatt v. State*, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) (observing that a judgment or order of the district court will be affirmed if it reached the right result albeit for a wrong reason).

Motion to dismiss

Schwatka claims the district court erred by denying his pretrial motion to dismiss the case because NRS 453.411's sentencing

provision is unconstitutional. We review a court's decision to grant or deny a motion to dismiss a case for abuse of discretion. *See Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008); *McNelton v. State*, 115 Nev. 396, 414, 990 P.2d 1263, 1275 (1999). Here, the court determined "the upshot of [Schwatka's] contention is that the penalty in Nevada for being found under the influence of methamphetamine, both in terms of being charged as a felony and consequential sentencing, is unconstitutionally severe in light of the fact that driving a motor vehicle while under the influence of methamphetamine is a misdemeanor subject to milder sentencing." The court found the Legislature's decision to brand the unlawful use of methamphetamine as a category E felony to be punished as provided for in NRS 193.130 does not shock the conscience or offend fundamental notions of human dignity. And the court concluded Schwatka failed to demonstrate the statute violated the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and their equivalent provisions in the Nevada Constitution.

We conclude Schwatka has not demonstrated the district court abused its discretion in this regard. *See Schmidt v. State*, 94 Nev. 665, 668, 584 P.2d 695, 697 (1978) ("[T]he legislature, within constitutional limits, is empowered to define crimes and determine punishments, and the courts are not to encroach upon that domain lightly. . . . Thus, it is frequently stated that a sentence of imprisonment which is within the limits of a valid statute, regardless of its severity, is normally not considered cruel and unusual punishment in the constitutional sense." (internal citations omitted)).

Expert testimony

Schwatka claims the district court erred by allowing a criminalist to testify about the effect of controlled substances on the human body. We review a court's decision to admit or exclude expert testimony for an abuse of discretion. *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). Here, the court heard testimony that Richard Bell received a Bachelor of Science degree in medical technology; attended numerous courses on drugs and alcohol and their effect on humans and human performance; was mentored on the effects of drugs on humans and the types of behaviors to expect; and had previously been qualified as an expert on the effects of alcohol, drugs, and controlled substances on the human body in the Elko, Humboldt, and White Pine County district courts. The court found Bell was "qualified as a criminalist for the testing of blood and urine for the presence of alcohol and controlled substances and their effect on the human body." We conclude Schwatka has not demonstrated the court abused its discretion in this regard.

Having concluded Schwatka is not entitled to relief, we ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Silver

cc: Hon. Nancy L. Porter, District Judge
Elko County Public Defender
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk