IN THE SUPREME COURT OF THE STATE OF NEVADA

AUSTIN L. SANDS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36329

FILED

NOV 09 2001

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

ORDER AFFIRMING IN PART AND REMANDING FOR CORRECTION OF JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of attempted murder with the use of a deadly weapon and one count of resisting a public officer. The district court sentenced appellant to serve various concurrent and consecutive prison terms totaling 48-240 months.

Appellant Austin L. Sands alleges manifold assignments of error. Although his contentions are too numerous to list at the outset of this order, Sands, in general, contends that the district court erred by (1) not holding unconstitutional the police officers' warrantless entry of his residence and subsequent seizure of his person; (2) precluding defense counsel from pursuing theories at trial regarding the officers' alleged illegal conduct and failure to follow department procedures; (3) violating his client-therapist privilege by admitting as evidence a journal that his therapist directed him to keep; (4) permitting the jury verdict where the State adduced insufficient evidence; and (5) not dismissing his case where his conviction violates due process because the officers' conduct "shocks the conscience."

Warrantless entry into the residence and seizure of Sands' person

First, Sands argues that the police officers violated the Fourth Amendment of the United States Constitution by entering his residence without a search warrant. Specifically, Sands contends that Ellen Sands, his estranged wife, did not have the requisite authority to consent to the entry.

The State responds that the officers' entry into the residence required neither warrant nor writ of execution because Ellen had actual

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authority to consent to the entry under the test articulated in United States v. Matlock.[1]

We conclude that the officers' warrantless entry and subsequent seizure of Sands' person was constitutionally permissible.

"Warrantless searches and seizures in a home are presumptively unreasonable."[2] Valid consent, however, exempts a search from the probable cause and warrant requirements of the Fourth Amendment.[3] Consent or permission to search may be obtained from

> "a third party who possesses actual authority over or other sufficient relationship to the premises or effects sought to be inspected. . . . Actual authority is proved (1) where defendant and a third party have mutual use of and joint access to or control over the property at issue, or (2) where defendant assumes the risk that the third party might consent to a search of the property."[4]

"The State bears the burden of proving consent by '[c]lear and persuasive evidence.'"[5]

Ellen showed the officers a written agreement indicating that she was the lessee of the residence and family court documentation awarding her various items of personal property allegedly located in the residence. She also gave the officers a key to enter the residence via the front door. We conclude that Ellen had actual authority to consent to the entry under Taylor and Matlock because both she and Sands used the residence and both could access it at anytime.[6]

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[1]415 U.S. 164 (1974).

[2]Doleman v. State, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991) (citing Payton v. New York, 445 U.S. 573, 587 (1980)).

[3]Howe v. State, 112 Nev. 458, 463, 916 P.2d 153, 157 (1996) (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973)).

[4]State v. Taylor, 114 Nev. 1071, 1079, 968 P.2d 315, 321 (1998) (citing United States v. Matlock, 415 U.S. 164, 171 (1974)).

[5]McIntosh v. State, 86 Nev. 133, 136, 466 P.2d 656, 658 (1970) (quoting Thurlow v. State, 81 Nev. 510, 515, 406 P.2d 918, 921 (1965)).

[6]Because we conclude that the search was constitutionally sound, we conclude that the district court did not err in denying Sands' motion to suppress all evidence resulting from the entry pursuant to Wong Sun v. United States, 371 U.S. 471 (1963).

Sands also argues that NRS 125.240 and Luciano v. Marshall[7] require a person involved in a divorce action to obtain a writ of execution before attempting to seize property in an ex-spouse's possession. Sands also cites to Soldal v. Cook County, Illinois[8] for the proposition that the police, without a proper court order, cannot enter the residence of another and assist a third party in removing personal property.

In Luciano, the appellant's personal property had been seized under a search order that was not statutorily authorized, but rather entered "in pursuance of execution" of a civil judgment.[9] This court, relying on Allen v. Trueman,[10] stated that "the search of [appellant's] residence, and wholesale seizure of his personal property therein, in aid of civil process, would have been precluded by the constitutional prohibitions against unreasonable searches and seizures."[11]

Soldal involved a civil rights suit brought by mobile home owners against deputy sheriffs and the owner and manager of a mobile trailer park arising from a trailer park employee disconnecting trailers from electrical utilities and towing the trailers off the premises while eviction proceedings were pending.[12] There, the park owner apparently attempted to take control and possession of the land located beneath the mobile trailers.

We conclude that neither Luciano nor Soldal apply to this matter. Luciano deals with instances where an officer is attempting to seize personal property in aid of a civil process. The officers here were not seizing Sands' personal property; rather, they were facilitating a lessee's safe arrival and departure from her residence. In Soldal, a third party title-holder wanted to seize control of property that was legally in the possession of another. Here, Ellen was entering her own residence to collect her personal property as evidenced by family court documentation.

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[7]95 Nev. 276, 593 P.2d 751 (1979).

[8]506 U.S. 56 (1992).

[9]95 Nev. at 277, 593 P.2d at 751.

[10]110 P.2d 355 (Utah 1941).

[11]Luciano, 95 Nev. at 278, 593 P.2d at 752.

[12]Soldal, 506 U.S. at 58-59.

Therefore, we conclude that Sands' arguments lack merit and that Ellen was not required to secure a writ of execution pursuant to NRS 125.240.[13]

Sands argues that the officers' claim that they relied on Ellen's consent to enter the residence was a pretextual ruse to arrest him for outstanding misdemeanor traffic warrants. There is no record evidence indicating that the outstanding misdemeanor warrants were impermissibly used by the officers as a pretext to enter the residence and arrest Sands. We therefore conclude that Sands' argument lacks merit.

Sands next argues that because the officers entered his residence with their guns drawn and shot at him, the officers used excessive force and unconstitutionally seized him. He argues that the police conduct violated Tennessee v. Garner.[14] We disagree.

In Garner, the Supreme Court ruled unconstitutional a Tennessee statute authorizing the use of deadly force against an unarmed, nondangerous fleeing suspect.[15] Here, on the other hand, Sands was armed with a rifle and, as Officer Rader testified, pointed it at Officer Rader's head. Prior to any exchange of gunfire, Sands was told several times to drop his weapon. Because the record reflects that Sands heightened the intensity of the altercation and because he was afforded multiple opportunities to relinquish his weapon prior to any gunfire, we conclude that the officers did not use excessive force in apprehending Sands.[16]

Sands also argues that he had a constitutional right to use deadly force in defense of his person and in response to deadly force used upon him by the officers pursuant to State v. Smithson.[17] We disagree.

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[13]Accordingly, we conclude that Sands' argument that the officers violated his right to equal protection when they used their police powers to benefit Ellen in a private civil matter to Sands' detriment lacks merit.

[14]471 U.S. 1 (1985).

[15]The statute provided that if, after a police officer has given notice of an intent to arrest a criminal suspect, the suspect flees or forcibly resists, "the officer may use all necessary means to effect the arrest." Tenn. Code Ann. § 40-7-108 (1982).

[16]Given Sands' reaction and resistance to the police presence in the residence, we conclude that Sands' argument that the seizure of his person violated the Fourth Amendment lacks merit.

[17]54 Nev. 417, 19 P.2d 631 (1933).

In Smithson, this court set forth a standard of self-defense against a police officer:

> "The citizen may resist an attempt to arrest him which is simply illegal, to a limited extent, not involving any serious injury to the officer. He is not authorized to slay the officer, except in self-defense; that is, when the force used against him is felonious, as distinguished from forcible."[18]

Smithson, however, was overruled by Batson v. State[19] "to the extent that it justifies the use of any force in response to anything less than a police officer's use of unlawful and excessive force." Because we conclude that the officers did not use excessive force, we also conclude that Sands' claim that he had a constitutional right to employ deadly force against the officers lacks merit.

Motion in limine

Second, Sands argues that the district court's ruling on his motion in limine violated his constitutional rights by depriving him of his right to confront his accusers, his right to the effective assistance of trial counsel, and his right to present his theory of the case.

The district court ruled on what Sands could and could not present at trial regarding the ancillary civil matters discussed above and Sands' alleged right to shoot at the officers. Although he was prohibited from arguing that he could shoot at the officers because they entered his residence without a warrant and with their guns drawn, Sands' counsel cross-examined Officers Rader and Whitmarsh at trial. We conclude that the district court did not violate Sands' constitutional right to confront his accusers by prohibiting him from asserting theories unsupported by law. Because Sands makes identical arguments in support of his ineffective assistance of trial counsel claim, we also conclude that the district court did not deprive Sands of his constitutional right to the effective assistance of trial counsel.

Sands also argues that under Roberts v. State[20] a criminal defendant is entitled to his theory of the case so long as there is some

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[18]Id. at 428, 19 P.2d at 634-35 (quoting Adams v. State, 57 So. 591, 592 (Ala. 1912)).

[19]113 Nev. 669, 676 n.3, 941 P.2d 478, 485 n.3 (1997).

[20]102 Nev. 170, 717 P.2d 1115 (1986).

evidence, no matter how weak or incredible, to support the theory. Contrary to Sands' reading and apparent misinterpretation, Roberts stands for the proposition that "a defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence, no matter how weak or incredible, to support it."[21]

Here, the record reflects that the jury was instructed regarding the defense theories that were supported by law. Specifically, Sands was allowed to argue that he did not know the intruders were indeed police officers, that the officers entered and fired upon him without provocation, and that he had to act in self-defense.

We conclude that the district court did not err in preventing Sands from asserting frivolous and legally unsupported defense theories that effectively endorse opening fire on police officers. Therefore, we conclude that Sands was not deprived of his right to present his theory of the case.

Client-therapist privilege

Third, Sands contends that the district court committed reversible error and breached his therapist-client privilege when it admitted into evidence a journal that Sands was directed to keep at the advice of his therapist.

The client-therapist privilege under NRS 49.246(2) states: "[A] communication is 'confidential' if it is not intended to be disclosed to any third person other than a person . . . [p]articipating in the diagnosis or treatment under the direction of the marriage and family therapist, including a member of the client's family."

Here, Sands' journal indicated that he was no longer receiving therapy from his counselor, Susan Thompson. Sands wrote, in part, "No, if anybody really gave a dam [sic] when I call for help. I would not be told no money, no help, even my counselor, Susan Thompson, stated that I was out of hours and credit, seek out the county." The journal also contained a portion listing persons to contact accompanied by their respective telephone numbers. Included in that list was Thompson's name and telephone number. Finally, Sands wrote: "Who ever [sic] reads this GOD

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[21]Id. at 172-73, 717 P.2d at 1116 (emphasis added).

BLESS YOU AND SORRY FOR THE BURDEN OF THIS LETTER, BUT NEEDED [sic] A HUMAN TO COMMUNICATE WITH IN THE END."

We conclude that the journal was not intended to be disclosed to just his therapist. The record reflects Sands was no longer seeing her in either a therapeutic or any other capacity when he authored the journal eventually seized by the officers. We further conclude that the journal was relevant to Sands' state of mind at the time of the altercation. Therefore, we conclude that the district court did not err by admitting the journal into evidence.

Sufficiency of the evidence

Fourth, Sands argues that the evidence adduced at trial was insufficient to support the jury's verdict. Sands, however, does not specify on which particular charge the State allegedly adduced insufficient evidence.

In reviewing a claim of insufficient evidence, this court must determine whether the jury, acting reasonably, could have been convinced beyond a reasonable doubt of the defendant's guilt by the competent evidence.[22] Where conflicting testimony is presented, the jury determines what weight and credibility to give it.[23] This court's inquiry is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[24]

Here, the jury listened to and weighed the testimony of Officers Rader and Whitmarsh. Officer Rader testified that Sands declared, "You are not going to get me! You're going to have to kill me!" He also testified that Sands had ample opportunities to relinquish his weapon, but instead aimed it at Officer Rader's head.

The jury also heard testimony from Sands who claimed that he did not know that the officers, not criminal intruders, were in his house and that he could not hear the police announce themselves. The jury further heard testimony from Sands' expert witness regarding his alleged hearing deficiencies.

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[22]Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980).

[23]Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

In light of the testimony delivered at trial, we conclude that any rational trier of fact could have found the essential elements of both charges (attempted murder with the use of a deadly weapon and resisting a public officer) beyond a reasonable doubt.[25]

Due process

Finally, Sands argues that the police officers' indifference for his safety and privacy rights should shock the conscious of this court and warrant dismissal for violating due process. In support of his contention, Sands cites to Rochin v. California[26] for the proposition that government conduct which infringes too greatly upon an individual's privacy interest shocks the conscious of the court and violates due process.

In Rochin, deputy sheriffs obtained information that the accused was selling narcotics. The sheriffs, without a warrant, entered an open door at the residence of the accused, forced open the door to his bedroom, and forcibly attempted to open his mouth and extract morphine capsules that he had swallowed.[27] The sheriffs then escorted the accused to the hospital where a physician, at a sheriff's direction, forced an emetic solution into the stomach of the accused against his will. This "stomach pumping" procedure produced vomiting, and in the vomit matter were two morphine capsules that the State used to convict the accused.[28] Because the sheriffs' conduct "shock[ed] the conscience," "offend[ed] a sense of

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. . . *continued*

[24]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original)).

[25]Sands argues that the district court erred by failing to grant him a new trial under this court's decision in Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000). The opinion from that case was filed on February 28, 2000, while the verdict in this case came down on February 18, 2000. Because "Byford does not invoke any constitutional mandate in directing that its new instructions be given in future cases, so there is no constitutional requirement that this direction have any retroactive effect," Garner v. State, 116 Nev. 770, 788, 6 P.3d 1013, 1025 (2000), we conclude that Sands' argument lacks merit.

[26]342 U.S. 165 (1952).

[27]Id. at 166-67.

[28]Id.

justice," and ran counter to the "decencies of civilized conduct," the Supreme Court reversed the conviction on Due Process grounds.[29]

Here, as discussed previously, the officers were merely facilitating the keeping of the peace as Ellen removed personal property from her residence. The officers had their guns drawn when they entered the residence as a safety precaution because they were informed that Sands owned a gun. Sands' reliance on Rochin is misplaced because the police conduct in question, although not gentle, pales in comparison. Therefore, we conclude that the officers' conduct does not warrant dismissal.

Error in judgment of conviction

Although we conclude that none of Sands' contentions warrant relief, our review of the record revealed a clerical error in the judgment of conviction. The judgment of conviction reflects that Sands was found guilty on counts one through four; however, the record on appeal reflects that he was acquitted on count two. We conclude that this matter must be remanded to the district court for the limited purpose of correcting this error in the judgment of conviction.

For the foregoing reasons, we

ORDER the judgment of conviction AFFIRMED IN PART and REMANDED IN PART for proceedings consistent with this order.[30]

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Jeffrey D. Sobel, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Clark County Clerk

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[29]Id. at 172-74.