

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW LEWIS MATHERLY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 36409

FILED

OCT 12 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY: *Richard*
CHIEF DEPUTY CLERK

ORDER OF REMAND

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of trafficking in a controlled substance, a violation of NRS 453.3385(1). The district court sentenced appellant to serve a term of 28-72 months in prison, and to pay a fine of \$20,000.00. Appellant was given credit for 10 days time served.

First, appellant contends the district court erred in denying his motion to suppress.¹ Appellant argues that the magistrate abused her discretion by issuing a warrant allowing for the nighttime search of appellant's briefcase in violation of NRS 179.045(6).² We disagree.

This court has held that "[a]bsent an abuse of discretion, a magistrate's finding of a reasonable necessity for night-time service should not be disturbed." King v. State, 116 Nev. ___, ___, 998 P.2d 1172, 1177 (2000) (quoting Sanchez v. State, 103 Nev. 166, 169, 734 P.2d 726, 728 (1987)). In this case, the telephonic application for the warrant

¹As part of his guilty plea, appellant specifically reserved the right to appeal the district court's denial of his motion to suppress.

²NRS 179.045(6) states, "The warrant must direct that it be served between the hours of 7 a.m. and 7 p.m., unless the magistrate, upon a showing of good cause therefor, inserts a direction that it be served at any time."

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allowing for the nighttime search included statements made by the officer to the magistrate expressing concern for the reasonable possibility that appellant would make bail and destroy the evidence. We conclude, based upon the information provided to her by the officer, that the magistrate did not abuse her discretion in issuing the search warrant, and that the district court did not err in denying appellant's motion to suppress.

Second, appellant contends the district court abused its discretion at sentencing by relying on impalpable and highly suspect evidence. Appellant argues that the district court relied upon statements made in another trial in sentencing appellant. Although we disagree with appellant's reasoning, we agree that the district court was in error and remand the case for resentencing.

"A judge should always disclose information he has received from third parties concerning the sentencing of a defendant. And if it appears from the record that the judge used such material or relied on it, the use of the information is deemed prejudicial if not divulged to the defendant." *Rice v. State*, 113 Nev. 1300, 1315, 949 P.2d 262, 271 (1997) (citation omitted).

Our review of the record on appeal reveals that the district court relied upon knowledge gathered in a previous trial in sentencing appellant. The district court, however, failed to divulge the use of this information to the defendant prior to the imposition of the sentence, as required by Rice. Prior to the imposition of the sentence, the district court judge made the following statement:

All right. The Court has of course some substantial knowledge with respect to this case as a result of the trial.

The Court has also been exposed to other information involving this Defendant and his brother as a result of a trial that occurred in August of 1999 involving the murder cases of Mr. Moore and Mr. Morris.

Simply put, Mr. Matherly, it's the Court's belief that you are a drug dealer who is a threat and a menace to society, and I intend to send a message to [you] and your brother, and this community: you ain't going to deal drugs in this community, and I am going to put you in prison for as long as I can.

We conclude that the use of such information in sentencing appellant constituted prejudicial error, and that appellant is entitled to a new sentencing hearing.

Having considered appellant's contentions, we remand this matter to the district court for resentencing before a different district court judge.

It is so ORDERED.

Young J.
Young

Maupin J.
Maupin

Becker J.
Becker

cc: Hon. James W. Hardesty, District Judge
Attorney General
Washoe County District Attorney
Dennis A. Cameron
Washoe County Clerk