IN THE SUPREME COURT OF THE STATE OF NEVADA

CRISTOBAL MORALES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37011

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of trafficking in a controlled substance. The district court sentenced appellant Cristobal Morales to serve 25 years in the Nevada State Prison and ordered him to pay a $500,000 fine.

Morales first contends that the district court erred in admitting the prior sworn testimony of George Pinion, an unavailable witness. Apparently, since that prior testimony, Morales heard from an unnamed source that Pinion had agreed to cooperate with federal authorities in exchange for not being charged in this case. Morales argued that he had a right to question Pinion about his alleged cooperation. The district court determined that admitting the prior testimony would not violate Morales's Sixth Amendment right to confront witnesses against him and admitted the prior testimony. Morales contends that the district court erred. We disagree.

Under NRS 171.198(6), either the State or the defendant may use the prior recorded testimony of an unavailable witness at trial. In order for the State to utilize the prior testimony, the defendant must have been represented by counsel, counsel must have cross-examined the

witness at the prior proceeding, and the witness must be unavailable.[1] This court has held that when these three requirements are met, admission of the prior testimony does not violate the defendant's Sixth Amendment right to confront witnesses against him.[2]

At Morales's first trial,[3] Pinion testified that on the evening of June 23, 1995, Morales was driving Pinion home from a job and stopped at a convenience store on the way. Morales got out of the car and spoke to someone. Pinion did not hear the conversation. Morales then got back in the car, and they left. A short time later, they were pulled over. When Sergeant Carlson found cocaine in a cigarette pack dropped by Morales, Pinion told him that it was not his. He also denied any ownership in the drugs at trial. On cross-examination, defense counsel established that Pinion never saw anyone hand the cigarette pack to Morales. But counsel did not ask Pinion if he received a deal in exchange for his testimony.

Morales concedes that Pinion was unavailable. And defense counsel cross-examined Pinion at the first trial. Thus, NRS 171.198(6) was satisfied. Moreover, Morales has not demonstrated a change in circumstances since his first trial. He pursued the same defense theory in both trials, namely that the cocaine did not belong to him so it must have

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[1]Funches v. State, 113 Nev. 916, 920, 994 P.2d 775, 777-78 (1997).

[2]Aesoph v. State, 102 Nev. 316, 319-320, 721 P.2d 379, 381-82 (1986); Drummond v. State, 86 Nev. 4, 6-8, 462 P.2d 1012, 1013-14 (1970); see also California v. Green, 399 U.S. 149, 165-168 (1970).

[3]Morales was first convicted in 1997. On direct appeal, we reversed Morales's conviction because the district court improperly limited his peremptory challenges. Morales v. State, 116 Nev. 19, 992 P.2d 252 (2000).

belonged to Pinion. And at the time of Morales's first trial, he knew that although Pinion had been arrested along with Morales for possession of the cocaine in the cigarette package, Pinion was not facing any charges. Thus, at the first trial Morales's attorney could have asked Pinion whether he was cooperating with the authorities to avoid being charged. Therefore, we conclude that the district court did not err in admitting Pinion's prior testimony.

Morales next contends that the State Board of Pharmacy improperly classified cocaine as a Schedule I substance because cocaine has accepted medical uses in this country. Morales bases this contention solely on the State's criminalist's testimony that one form of cocaine is used as a local anesthetic and classified as a Schedule II substance; he offers no case law to support his claim that the Board exceeded its authority in classifying powder cocaine as a Schedule I controlled substance.

The legislature gave the Board the power to classify controlled substances in five schedules.[4] The Board makes factual determinations as to the medical propriety of the substance and then classifies it according to the legislature's guidelines for each schedule.[5] A Schedule I substance has "high potential for abuse" and either "has no accepted medical use" or "lacks accepted safety for use in treatment under medical supervision."[6] A Schedule II substance also has "high potential for abuse," but the

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[4]NRS 453.146.

[5]Sheriff v. Luqman, 101 Nev. 149, 154, 697 P.2d 107, 110 (1985).

[6]NRS 453.166.

"substance has accepted medical use for treatment in the United States or accepted medical use with severe restrictions."[7]

The record before us supports the Board's determination that powder cocaine should be placed on Schedule I and cocaine hydrochloride on Schedule II.[8] While there is at least one medical use for the pharmaceutically prepared liquid form, Morales has offered none for the powder form. Thus, Morales has failed to demonstrate that the Board erroneously classified powder cocaine as a Schedule I controlled substance.

Morales finally contends that because cocaine is listed as a Schedule I and Schedule II controlled substance, the district court's instruction that cocaine is a Schedule I controlled substance was improper. Apparently, Morales wanted the jury to decide whether the cocaine at issue is a Schedule I or II controlled substance.

A defendant is entitled to an instruction on his theory as long as some evidence supports it.[9] As discussed above, Morales is correct that one form of cocaine is listed as a Schedule II controlled substance. However, he ignores the fact that cocaine in any other form falls under Schedule I.[10] In this case, the cocaine was in powder form. And Morales did not present any evidence that the cocaine at issue was prepared and

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[7]NRS 453.176.

[8]See State, Emp. Sec. Dep't v. Holmes, 112 Nev. 275, 279, 914 P.2d 611, 614 (1996) (noting that this court will defer to an administrative agency's factual finding that is supported by the record).

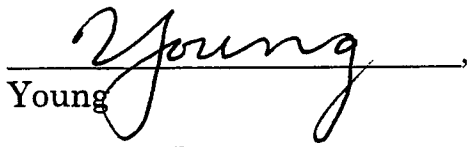
[9]Wegner v. State, 116 Nev. 1149, 1156-57, 14 P.3d 25, 30 (2000).

[10]NAC 453.510(8).

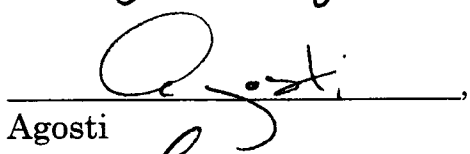
registered as necessary for Schedule II classification. Thus, the district court's instruction was proper.

Having considered Morales's contentions and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.



Young, J.



Agosti, J.

Leavitt, J.

cc: Hon. Donald M. Mosley, District Judge
Attorney General/Carson City
Clark County District Attorney
Clark County Public Defender
Clark County Clerk