IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES ALVIN WATSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39879

FILED

JUN 18 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of possession of a controlled substance.

FACTS

David Owens was driving a pickup truck with James Watson as a passenger. Owens was operating the truck at night without headlights. Officer Jim Mathes of the Carlin Police Department stopped the vehicle. According to Watson, Owens woke him up and told him to "[d]o something with this[;] we are being stopped." After obtaining the driver's identification, Mathes learned an outstanding felony warrant existed for Owens. Pursuant to his training, Mathes began high-risk felony stop procedures. These procedures included a request for an additional officer on the scene.

At gunpoint, the police ordered Owens out of the vehicle and took him into custody. Then, the police ordered Watson out of the vehicle. While initially unresponsive, Watson eventually emerged from the vehicle with a pack of cigarettes in his left hand. The police ordered Watson, several times, to drop the package; Watson finally complied. Inside the

cigarette pack, Mathes found two plastic bags containing a white powdery substance.

Mathes believed the substance was methamphetamine. Officer Mike Hoadley searched Watson further. Hoadley's search of Watson produced two glass test tubes with residue inside and two lighters. Based on experience and training, Mathes deduced the pipes were for smoking methamphetamine. The police also searched two lunchboxes found in the bed of the pickup truck. One was labeled "Owens"; the other had no identification. Police found two plastic containers with a white crystalline substance inside the lunchbox with no identification. The officers reasonably believed the unidentified lunchbox belonged to Watson.

The State charged Watson with possession of a controlled substance, a class E felony pursuant to NRS 453.336. An Elko Justice of the Peace conducted a preliminary hearing and determined probable cause existed to bind Watson over for trial. Mathes testified to the facts set forth above at the preliminary hearing.

Watson filed a pre-trial habeas corpus petition claiming Mathes' identification of the controlled substance was insufficient to bind Watson over for trial. The district court quashed the petition following a hearing on the matter.

The State moved for an order to amend the criminal information. The amendment sought to increase the punishment for Watson if convicted based on two prior convictions. The district court granted the motion and Watson stood trial on the amended information. Watson was found guilty of a class D felony by a jury and sentenced to nineteen to forty-eight months. This appeal followed.

DISCUSSION

First, Watson contends the district court erred in denying his writ of habeas corpus because the State failed to provide sufficient evidence at the preliminary hearing that he possessed a controlled substance. We disagree.

A magistrate can hold a defendant over for trial if, from the evidence, probable cause exists to show a crime has been committed and the defendant likely committed it.[1] "[P]robable cause may be based on slight, even 'marginal' evidence,[2] because it does not involve a determination of guilt or innocence."[3] The State must offer "substantial and competent evidence."[4] "'[T]he testimony of a qualified police officer satisfies the standard of probable cause necessary to support the indictment.'"[5]

The totality of the circumstances suggests Officer Mathes had probable cause to believe Watson possessed a controlled substance. Mathes testified that he received controlled substance training at the Nevada Law Enforcement Academy from a Nevada Division of Investigation investigator. The training consisted of two eight-hour

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[1]NRS 171.206.

[2]Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980).

[3]Hodes, 96 Nev. at 186, 606 P.2d at 180; see also Sheriff v. Dhadda, 115 Nev. 175, 180, 980 P.2d 1062, 1065 (1999); Sheriff v. Middleton, 112 Nev. 956, 961, 921 P.2d 282, 286 (1996).

[4]Sheriff v. Medberry, 96 Nev. 202, 203-04, 606 P.2d 181, 182 (1980).

[5]Wagoner v. Sheriff, 87 Nev. 113, 114, 482 P.2d 296, 297 (1971) (quoting Zampanti v. Sheriff, 86 Nev. 651, 653, 473 P.2d 386, 387 (1970)).

classes, in which the investigator demonstrated identification techniques for controlled substances and included actual samples of controlled substances. Mathes further testified he observed methamphetamine in the field on several occasions.

Using his training, education, and experience, Mathes identified the contents of Watson's cigarette pack as methamphetamine based on visual appearance, texture, location, proximity to residue-filled glass tubes used for smoking methamphetamines, and a lighter. Mathes' testimony was sufficient to establish probable cause and hold Watson over for trial. Thus, the district court did not err in denying Watson's petition for a writ of habeas corpus.

Second, Watson argues the district court erred when it allowed the State to amend the criminal information prior to trial. We disagree.

An information may be amended "at any time before verdict or finding if no additional . . . offense is charged and if substantial rights of the defendant are not prejudiced."[6] Prejudice is shown when amendment would not allow a defendant to prepare a proper defense at trial.[7]

The amended information indicated Watson's eligibility for enhanced punishment as a repeat offender; no additional offense was charged. Furthermore, Watson was charged with possession of a controlled substance. Nothing contained in the amended information precluded Watson from preparing a defense to this charge. As such, the

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[6]NRS 173.095(1); see also DePasquale v. State, 106 Nev. 843, 847, 803 P.2d 218, 220-21 (1990) (explaining amendments are allowed where court finds no prejudice of defendant's substantial rights).

[7]Biondi v. State, 101 Nev. 252, 256, 699 P.2d 1062, 1065 (1985).

district court did not err in allowing the amended information because Watson's rights were not prejudiced or violated.

Third, Watson asserts the district court erred by finding inadmissible his statement about what Owens told him as police stopped their vehicle. We disagree.

NRS 51.345(1) requires "the declarant [be] unavailable as a witness." Unavailability is defined as "refusing to testify despite an order of the judge to do so."[8] Further, "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."[9]

Watson's statement appears unreliable when examined under the "totality of the circumstances."[10] Further, Watson did not show Owens to be unavailable under NRS 51.055(1)(b). Thus, the district court properly found the statement inadmissible.

Finally, Watson contends the district court should not have adjudicated him as a third-time offender pursuant to NRS 453.336. We disagree.

NRS 453.336(2) allows a repeat offender to be punished for a class D felony instead of a class E felony. The requirement for enhanced punishment is that "the offender has previously been convicted two or

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[8]NRS 51.055(1)(b).

[9]NRS 51.345(1).

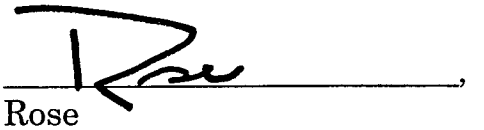
[10]Miller v. Sheriff, 95 Nev. 255, 256, 592 P.2d 952, 953 (1979).

more times in the aggregate of any violation of the law of the United States or of any state . . . relating to a controlled substance."[11]

The State met its burden of production by presenting certified copies of Watson's two previous convictions. The Legislature made no distinctions regarding prior convictions. We conclude Watson's previous judgment of conviction for concealing evidence of possession of a controlled substance "relat[es] to a controlled substance."[12] Thus, the district court did not err in adjudicating Watson as a third-time offender pursuant to NRS 453.336.

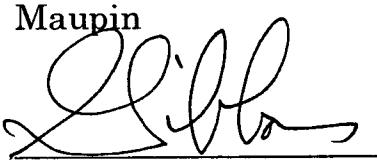
Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose

_____, J.
Maupin



_____, J.
Gibbons

cc: Hon. Andrew J. Puccinelli, District Judge
Elko County Public Defender
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk

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[11]NRS 453.336(2)(b).

[12]Id.