IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK ANTHONY LUPERCIO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39944

FILED

MAY 28 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of third-offense driving under the influence (DUI), a category B felony. The district court sentenced appellant Mark Anthony Lupercio to serve a prison term of 12-30 months and ordered him to pay a fine of $2,000.00.

Lupercio first contends that the district court erred in denying his motion to suppress evidence of his intoxication.[1] He argues that his initial encounter with the arresting officer was "a Terry stop made without reasonable suspicion."[2] We disagree.

A police officer may initiate an investigatory stop based only upon a reasonable articulable suspicion that the person or vehicle may be engaged in criminal activity.[3] Judicial determinations of reasonable

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[1]In the plea agreement, Lupercio expressly reserved the right to contest on appeal the district court's denial of his two motions to suppress and his pretrial petition for a writ of habeas corpus. See NRS 174.035(3).

[2]See Terry v. Ohio, 392 U.S. 1 (1968).

[3]See State v. Sonnefeld, 114 Nev. 631, 633-34, 958 P.2d 1215, 1216-17 (1998); State v. Wright, 104 Nev. 521, 523, 763 P.2d 49, 50 (1988); see also NRS 171.123(1) ("Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime").

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suspicion must be based upon the totality of the circumstances.[4] On appeal, this court will not disturb a district court's findings of fact in a suppression hearing where they are supported by substantial evidence.[5]

The district court found that the initial encounter between Lupercio and the arresting officer "did not arise to the level of a Terry stop" because the officer was sitting in his vehicle when Lupercio approached the officer on foot and initiated the encounter. Substantial evidence supports the district court's determination.

Specifically, Officer Robert Roy of the Elko Police Department testified at the preliminary hearing that he noticed a parked vehicle, with its headlights on, while he was patrolling around 2:00 a.m. on the morning in question. Soon after, Roy noticed the same vehicle with its lights off and seemingly unoccupied. Roy again noticed the vehicle, this time turning into a parking corridor, where Roy watched Lupercio park the vehicle and then begin walking away from it. When Roy pulled his patrol car into Lupercio's path, Lupercio continued walking toward Roy's vehicle while Roy remained seated in his parked patrol car. While speaking with Lupercio, Roy smelled a strong odor of alcohol and noticed that his eyes were watery and bloodshot and that his speech and coordination were impaired. Roy then arrested Lupercio after he refused to submit to a standardized field sobriety test.

The district court alternatively found that Officer Roy had probable cause to initiate a stop. Again, the district court's finding is supported by substantial evidence. Specifically, Roy testified that he

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[4]See United States v. Arvizu, 534 U.S. 266, 273 (2002).

[5]See State v. Harnisch, 113 Nev. 214, 219, 931 P.2d 1359, 1363 (1997), clarified on rehearing, 114 Nev. 225, 954 P.2d 1180 (1998).

witnessed Lupercio making a left-hand turn from the right-hand lane of the road, and that Lupercio, while still in the truck, suspiciously made efforts to elude the officer.

Second, Lupercio contends that the district court should have granted his motion to suppress on the ground that the evidence of his intoxication was obtained in violation of the implied consent statute.[6] After his arrest, Roy informed Lupercio of the implied consent law. But Roy testified, because Lupercio "continued to verbally berate me and yell and scream obscenities," Roy did not give Lupercio the option of a breath test, and instead took him to the hospital for a blood test. In his motion below and on appeal, Lupercio argues: "Such choice is required on a first DUI, as Roy apparently thought this to be at the time he decided not to offer such a choice. See NRS 484.383(4). Therefore, the resulting blood test should have been suppressed." We disagree.

The record reveals that Officer Roy fully complied with the implied consent statutes. Specifically, in a written arrest report prepared on the date of the arrest, Roy declares:

> Subject became combative and had to be physically restrained and placed into patrol unit. Check on subject. Dispatch advised prior DUI convictions in 1994, 1995, 1997. While inspecting vehicle he was driving, subject exited patrol unit and while shouting obscenities, ran away from vehicle attempting to escape. Subject was recaptured mid way through parking corridor.

(Emphasis added.) Thus, the record establishes that Roy had reasonable grounds to believe that Lupercio had been convicted of DUI within the previous 7 years before he transported Lupercio to the hospital for a blood

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[6]See NRS 484.383(1), (4).

draw. The implied consent statute provides that "[a] police officer may direct the person to submit to a blood test" under such circumstances.[7]

Lupercio next contends that the district court erred in denying his motion to suppress evidence that a key found in the vicinity of his encounter with the Elko police proved to be the ignition key to the vehicle that Roy saw him driving. Lupercio argues that "the placing of the key in the vehicle was an improper search" in violation of the Fourth Amendment.[8] We disagree.

In State v. Lisenbee, this court held that an individual who voluntarily abandons property has no standing thereafter to raise a Fourth Amendment challenge.[9] Abandonment occurs when a reasonable person objectively relinquishes his privacy interests in an object by an express disclaimer of ownership.[10] Such an abandonment may be made by verbal disclaimers and/or physical relinquishment of ownership.[11]

Officer Roy testified at the preliminary hearing that Lupercio denied he was driving any vehicle and claimed that his vehicle was in a repair shop. Officer Luna testified that he overheard Lupercio state that he had not been driving any vehicle. When Lupercio was searched incident to his arrest, on two occasions, no vehicle keys were found. Officer Price testified to having found a key later that evening under a car

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[7]See NRS 484.383(4)(c)(2)(I).

[8]U.S. Const. amend. IV.

[9]116 Nev. 1124, 1130, 13 P.3d 947, 951 (2000); see also U.S. v. Stephens, 206 F.3d 914, 917 (9th Cir. 2000).

[10]State v. Taylor, 114 Nev. 1071, 1077-78, 968 P.2d 315, 320 (1998).

[11]See Stephens, 206 F.3d at 917.

parked in the vicinity of the vehicle Lupercio was seen driving. The key proved to be the ignition key. Thus, substantial evidence supports the district court's finding that Lupercio denied driving the truck and disclaimed any possessory interest in the vehicle.

Fourth, Lupercio contends that the district court erred in quashing his pretrial petition for a writ of habeas corpus. Lupercio argues that the justice court erred in binding him over to the district court on the third-offense DUI charge because the State failed to present any evidence of prior DUI convictions at the preliminary hearing and merely alleged the facts pertaining the prior convictions in the criminal complaint.

The district court determined that the State, in fact, did not produce the required evidence of the prior convictions at the preliminary hearing. Nevertheless, the district court took judicial notice of the prior convictions and quashed the writ. The district court observed that "all three prior convictions occurred in Elko County and all three were handled by Elko Township Justice Court." We conclude that the district court did not err.

In Parsons v. State, this court explained that although the State need not prove the constitutional validity of prior DUI convictions at the preliminary examination, the facts concerning a prior offense must be alleged in the charging document and shown at the preliminary examination.[12] As the district court correctly held, it is not enough for the State to simply to include factual allegations concerning the prior convictions in the charging document, it must also present evidence at the preliminary hearing demonstrating probable cause to believe the facts

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[12]116 Nev. 928, 935, 10 P.3d 836, 840 (2000); see also NRS 484.3792(2).

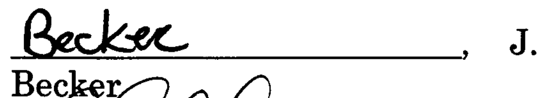
alleged. Despite the State's failure to properly present the requisite evidence concerning the prior convictions at the preliminary hearing, the district court properly concluded that it could take judicial notice of the prior convictions.[13] It is also noteworthy that Lupercio has not contested at any time in the proceedings below or on appeal the validity of the prior convictions.

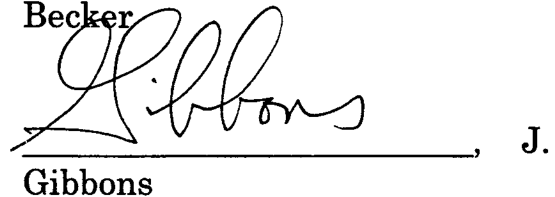
Finally, Lupercio contends that the justice court erred in binding him over to the district court on the felony escape charge. Because the State dismissed the escape charge as part of the plea agreement, Lupercio cannot demonstrate any prejudicial, reversible error in this appeal.

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

ORDER the judgment of conviction AFFIRMED.

_________________, C.J.
Shearing


_________________, J.
Becker


_________________, J.
Gibbons

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[13]NRS 47.130(2) states that "[a] judicially noticed fact must be . . . [g]enerally known within the territorial jurisdiction of the trial court; or . . . [c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute."

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