IN THE SUPREME COURT OF THE STATE OF NEVADA

LOREN D. SELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40779

FILED

AUG 26 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Loren Sell appeals from a final judgment of conviction entered following jury verdicts of guilty of three counts of possession of a short-barreled shotgun, one count of attempt to manufacture/possess a short-barreled shotgun, and one count of unlawful possession, manufacture, or disposition of an explosive or incendiary device. On appeal, Sell argues that evidence gathered from his residence was not admissible because he did not consent to the search; his statements made to the police were inadmissible because he was not given proper Miranda[1] warnings; evidence relating to his bad character was inadmissible; there was insufficient evidence to support his conviction; and his sentence amounts to cruel and unusual punishment.

[1]Miranda v. Arizona, 384 U.S. 436 (1966).



04-15428

Consent to search

Sell argues that the district court erred in denying his motion to suppress evidence seized during the search of his residence at 1428 Blushing Bride in Las Vegas.

Suppression issues present mixed questions of law and fact.[2] We will not disturb a district court's findings of fact in a suppression hearing if they are supported by substantial evidence,[3] but we review legal questions, such as whether a search is constitutional, de novo.[4]

In order to assert a violation under the Fourth Amendment, a defendant must have a subjective and an objective expectation of privacy in the place searched or the items seized.[5] A search conducted without a search warrant is considered unreasonable and unconstitutional unless the search falls within an exception to the warrant requirement.[6] One such exception is when a third party validly consents to the search.[7]

The government bears the burden of establishing the effectiveness of a third party's consent and can do so by showing that the third party had actual or apparent authority to consent to the search.[8] Actual authority exists where the defendant and the consenting third

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[2]Johnson v. State, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002).

[3]Id.

[4]Id.

[5]State v. Taylor, 114 Nev. 1071, 1078, 968 P.2d 315, 321 (1998).

[6]Id. at 1078, 968 P.2d at 321.

[7]Id. at 1079, 698 P.2d at 321.

[8]State v. Miller, 110 Nev. 690, 699, 877 P.2d 1044, 1050 (1994).

party have mutual use of and joint access to or control over the premises at issue, or where the defendant assumes the risk that the third party might consent to the search of the premises.[9] Apparent authority exists when a police officer reasonably believes that the third party has actual authority to consent to the search.[10]

Here, Officer Michael Jeffries conducted a welfare check at 1428 Blushing Bride, where Sell was believed to reside. Officer Jeffries tried to make contact with someone inside the residence, but no one was there. Officer Jeffries contacted the homeowner, Michael Stock,[11] and Stock arrived at the residence shortly thereafter. Stock informed Officer Jeffries that Sell lived in a wooden structure in the garage, and Stock opened the door to the attached garage so that Officer Jeffries could see whether Sell was inside. Upon entering the garage, Officer Jeffries saw a 10-feet-by-10-feet wooden structure that had what appeared to be plastic lining as a door and an air conditioning unit attached to the structure. Officer Jeffries could see through the plastic lining and did not enter the structure because Sell did not appear to be inside.

Stock informed Officer Jeffries that the rest of the garage area was a common area, which Stock and Sell both used. In plain view on the workbench in the common area, Officer Jeffries saw several shotguns. Inside a clear plastic set of drawers, Officer Jeffries also saw a metal device with wires sticking out of it. Based on Officer Jeffries' training, he

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[9]Taylor at 1079, 698 P.2d at 321.

[10]Miller, 110 Nev. at 699, 877 P.2d at 1050.

[11]Apparently, Stock was actually the tenant in possession who was renting the house from the owner, Albert Munez. RAB 3.

believed the device to be a pipe bomb, and he immediately evacuated the garage and called the LVMPD bomb squad and the Bureau of Alcohol, Tobacco, and Firearms (ATF). After Stock signed a consent to search form, law enforcement officers searched the garage area and found three short-barreled shotguns and a pipe bomb.

Sell contends that the entire garage was his residence; hence, he was the only person who could consent to the search. However, there is no evidence to support his contention that he rented the entire garage. Instead, the evidence shows that, with the exception of the wooden structure where Sell resided, the garage was shared space. Because Stock and Sell had mutual use of and joint access to the garage area where the search was conducted, we conclude that Stock had authority to consent to the search. Accordingly, we conclude that the evidence seized from the search of the garage area was admissible.

Miranda warnings

Sell argues that the district court should have excluded his statements to the police because Officer Jason McCarthy did not give him a full recitation of his Miranda rights. Officer McCarthy testified that he gave Sell Miranda warnings from memory because he did not have a Miranda card with him at the time. Officer McCarthy stated:

> I told him that he had the right to remain silent; that anything that he said could and will be used against him in a court of law.
>
> He has a right to an attorney. If he can't afford one, that one will be appointed to him; and if he understood his rights.

Officer McCarthy failed to specifically inform Sell that he had the "right to the presence of an attorney."[12]

In Criswell v. State,[13] Criswell was advised that he had the right to remain silent, that anything that he said could be used against him in court, that he had the right to counsel, and that if he was indigent, counsel would be provided to him. This court concluded that although the Miranda warnings given "did not specifically advise the appellant that he was entitled to have an attorney present at that moment and during all stages of interrogation, no other reasonable inference could be drawn from the warnings as given."[14] In so concluding, this court agreed with the Eighth Circuit Court of Appeals' conclusion that "'the Supreme Court did not prescribe an exact format or postulate the precise language that must be used in advising a suspect of his constitutional right to remain silent,'" and that "'the substance and not the form of the warnings should be of primary importance.'"[15]

Based on our holding in Criswell, we conclude that the warnings given in this case were sufficient. Similar to the appellant in Criswell, Sell was informed that he had the right to an attorney, but not that the attorney could be present at that moment and during interrogation. Based on our conclusion that such an omission does not

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[12]Miranda, 384 U.S. at 444 (emphasis added).

[13]84 Nev. 459, 460, 443 P.2d 552, 553 (1968).

[14]Id. at 462, 443 P.2d at 554.

[15]Id. (quoting Tucker v. United States, 375 F.2d 363, 369 (8th Cir. 1967)).

warrant exclusion of statements made to the police, we conclude the district court did not err in admitting Sell's statements to the police.

Character evidence

Sell argues that the State improperly elicited bad character evidence during trial, materially prejudicing him. Specifically, Sell contends that the State purposely asked Sell's mother about prior threats made by Sell. However, the State contends that no error occurred because the district court did not permit the State to pursue its line of questioning related to specific threats made by Sell, and the district court ordered the jury to disregard the State's question. We agree.

Sell's mother stated on cross-examination that her son had not made any specific threats in their recent conversations. On redirect, the State asked whether Sell had made threats in the past, and Sell's mother answered affirmatively, but when she tried to go into detail, Sell objected. The State then reminded Sell's mother to answer only "yes or no." Thereafter, the State asked whether Sell had ever acted on any of his threats in the past. Before Sell's mother could answer the State's question, Sell objected. The district court instructed the jury to disregard the State's question. Under these circumstances, we conclude that there was no prejudice or reversible error.[16]

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[16]See Stewart v. State, 94 Nev. 378, 379-80, 580 P.2d 473, 474 (1978) (concluding that there was no reversible error when the appellant was asked an allegedly improper question, appellant's counsel objected before she had an opportunity to answer, the objection was sustained, and the State did not pursue the line of questioning).

Insufficient evidence

Sell argues that there is insufficient evidence to support his conviction. Particularly, Sell argues that because the seized items were not functional as weapons, he could not be convicted of possession and manufacture of short-barreled shotguns and an explosive device.

NRS 202.275(1) states that a person who knowingly or willfully possesses, manufactures, or disposes of any short-barreled shotgun is guilty of a felony. NRS 202.275(2)(b) defines a short-barreled shotgun as:

> (1) A shotgun having one or more barrels less than 18 inches in length; or
>
> (2) Any weapon made from a shotgun, whether by alteration, modification or other means, with an overall length of less than 26 inches.

Evidence showed that two of the seized shotguns had barrels of less than 18 inches long, with an overall length of less than 26 inches, and the other shotgun had an overall length of less than 26 inches. Thus, Sell's manufacture and possession of the shotguns was illegal under NRS 202.275. The statute does not require that the shotguns be functional in order to be convicted. Nevertheless, evidence showed that the shotguns, with slight modifications, could be made functional. Consequently, we conclude that substantial evidence supports Sell's conviction under NRS 202.275.[17]

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[17]See Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (observing that a verdict will be upheld if after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements beyond reasonable doubt).

NRS 202.260(1) states that a person who unlawfully possesses, manufactures, or disposes of any explosive or incendiary device with the intent to destroy life or property is guilty of a felony. There was evidence presented that the device seized from the garage was a pipe bomb, the powder in the pipe bomb was smokeless explosive powder, and the pipe bomb would explode if ignited. Like NRS 202.275, NRS 202.260 does not require that the device be operational to be convicted under the statute; therefore, it is of no consequence that the pipe bomb was never ignited. Accordingly, we conclude that sufficient evidence supports Sell's conviction under NRS 202.260.[18]

Sentence

Sell contends that his sentence is disproportionate to the crimes charged and fundamentally unfair. The district court sentenced Sell as follows: three maximum terms of forty-eight (48) months in the Nevada Department of Corrections with a minimum parole eligibility of twelve (12) months for the three counts of possession of a short-barreled shotgun, with the sentences running concurrently; a maximum term of forty-eight (48) months with a minimum parole eligibility of thirteen (13) months for attempt to manufacture/possess a short-barreled shotgun to run consecutively to the term for the first three counts; and a maximum term of forty-eight (48) months with a minimum parole eligibility of thirteen (13) months for unlawful possession, manufacture, or disposition of an explosive or incendiary device to run consecutively to the terms for the other counts.

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[18]Id.

The district court is allowed wide discretion in imposing a sentence.[19] Absent an abuse of discretion, this court will not disturb the district court's determination.[20] "A sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'"[21]

NRS 202.275(1) states that a person convicted of possessing or manufacturing a short-barreled shotgun must be sentenced to imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 4 years. NRS 202.260(1) provides that a person who is convicted of unlawful possession, manufacture, or disposition of an explosive or incendiary device must be sentenced to imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years. Because Sell's sentence does not exceed these statutory guidelines or shock the conscience, we conclude that the district court did not abuse its discretion when sentencing Sell.

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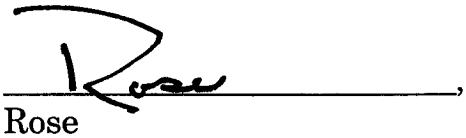
[19]Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993).

[20]Id.

[21]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

Having considered Sell's arguments on appeal and concluding they lack merit, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
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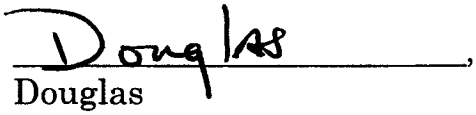

_____, J.
Douglas

cc: Hon. Kathy A. Hardcastle, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk