

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALBERTO RODRIGUEZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41133

**FILED**

OCT 27 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of level-one trafficking in a controlled substance. The district court sentenced appellant Alberto Rodriguez to serve a prison term of 28 to 72 months.

Rodriguez first contends that the district court erred in denying his motion to dismiss based on a purported violation of his right to a speedy trial. We disagree.

The Sixth Amendment to the United States Constitution provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."<sup>1</sup> In determining whether a defendant's Sixth Amendment right to a speedy trial was violated, this court considers four factors: the "length of [the] delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."<sup>2</sup>

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<sup>1</sup>See also NRS 178.556(1) (district court may dismiss indictment or information if defendant has not postponed trial and is not brought to trial within sixty days after arraignment).

<sup>2</sup>Barker v. Wingo, 407 U.S. 514, 530 (1972).

In this case, we conclude that the district court did not err in denying Rodriguez's motion to dismiss. First, the delay between arraignment and trial was relatively short: Rodriguez's trial began 71-days after his arraignment. Second, there was a valid reason for the delay, namely, after Rodriguez agreed to plead guilty, the State released the confidential informant (CI), the CI relocated to Texas, and the State's investigator had difficulty locating the CI to serve him with a trial subpoena.<sup>3</sup> Third, the district court found that Rodriguez was partly to blame for the delay because the State only released the CI after Rodriguez agreed to enter a guilty plea and, therefore, the "actions of the defendant caused the confidential informant to not be readily accessible by the District Attorney's Office." Fourth, we agree with the district court that there is "nothing in the record to indicate that Mr. Rodriguez would be in any way prejudiced by a very short continuance of two weeks, and further, [Rodriguez] was not in custody and was not being deprived of his liberty." After balancing the factors set forth above, we conclude that Rodriguez's right to a speedy trial was not violated.

Rodriguez next contends that the district court erred in denying his challenge for cause because a prospective juror had a strong bias that could not be set aside.<sup>4</sup> We conclude that Rodriguez's contention lacks merit.

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<sup>3</sup>Before entry of his plea, Rodriguez changed his mind and decided to proceed to trial.

<sup>4</sup>In a related argument, Rodriguez contends that the district court erred when it "cut off [defense counsel's] inquiry into whether the juror was certain that she could set aside her views." Based on our review of the record of voir dire, we conclude that the district court provided Rodriguez with an adequate opportunity to question the prospective juror.

*continued on next page . . .*

During voir dire, the prospective juror stated that she believed that an arrested person was more likely to have committed a crime than someone who had not been arrested because the State has to have a certain amount of evidence to charge someone with a crime. In response, the district court explained the difference between an accusation and evidence and informed the prospective juror that, at trial, she would have to base her decision of guilt or innocence solely upon the evidence. The district court then asked the prospective juror if she could base her decision of guilt or innocence solely on the evidence presented at trial. The prospective juror answered in the affirmative. Thereafter, the prospective juror was questioned by defense counsel and, again, responded that she could set aside her belief about arrested persons and base her decision solely on the evidence presented at trial. Ultimately, the district court denied Rodriguez's challenge for cause, finding the prospective juror could adjudicate the facts fairly and impartially. Rodriguez moved for a mistrial based on the district court's refusal to remove the juror. The district court denied Rodriguez's motion for a mistrial.

"[I]t is within the sound discretion of the trial court to determine whether a mistrial is warranted. Absent a clear showing of abuse of discretion, the trial court's determination will not be disturbed on appeal."<sup>5</sup> Likewise, "[a] trial court has broad discretion in its rulings on

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See Witter v. State, 112 Nev. 908, 914, 921 P.2d 886, 891 (1996) (noting that the district court has broad discretion with regard to the scope of voir dire).

<sup>5</sup>Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996) (citations omitted).

challenges for cause."<sup>6</sup> A trial court's finding that a juror is fair and impartial will be upheld if supported by substantial evidence.<sup>7</sup>

In the instant case, we conclude that the district court did not abuse its discretion in denying Rodriguez's motion for a mistrial or in refusing to excuse the prospective juror for cause. The district court's finding that the prospective juror could be fair and impartial is supported by substantial evidence; in particular, the prospective juror repeatedly informed the court that she would set her personal beliefs aside and base her decision of guilt or innocence solely on the evidence presented at trial.

Finally, Rodriguez contends that the district court erred in allowing the trial to proceed after Rodriguez failed to appear on the second and third day of trial.<sup>8</sup> While acknowledging that this court's holding in Hanley v. State<sup>9</sup> allows for a trial where the defendant is absent of his own volition, Rodriguez asks this court to overrule Hanley and declare NRS 178.388(2)(a) unconstitutional.<sup>10</sup> However, Rodriguez fails to explain why NRS 178.388(2) is unconstitutional or cite any relevant legal authority in

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<sup>6</sup>Walker v. State, 113 Nev. 853, 865, 944 P.2d 762, 770 (1997) (citing Wainwright v. Witt, 469 U.S. 412, 428-29 (1985)).

<sup>7</sup>See id. at 866-67, 944 P.2d at 771.

<sup>8</sup>According to the presentence investigation report, Rodriguez failed to appear on the second day of trial because he "got scared," left to find a new attorney, and assumed he would receive a new trial because of his absence.


<sup>9</sup>83 Nev. 461, 434 P.2d 440 (1967).


<sup>10</sup>NRS 178.388(2)(a) provides that "[t]he defendant's voluntary absence after the trial has been commenced in his presence must not prevent continuing the trial to and including the return of the verdict."

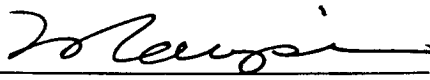
support of his argument that Hanley should be overruled. We therefore decline to consider his argument.<sup>11</sup>

Having considered Rodriguez's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Leavitt

  
\_\_\_\_\_, J.  
Maupin

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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<sup>11</sup>See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).