

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC EDWARD NEUBECKER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 41227

**FILED**

MAR 17 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of twenty-three counts of theft. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

On March 19, 2002, appellant Eric Edward Neubecker was arrested for embezzling funds from his former employer, Reno Orthopedic Clinic. This arrest stemmed from irregularities uncovered by the Reno Orthopedic Clinic during an internal audit of its accounts payable. Among these irregularities were several refund checks which were handwritten instead of computer generated. While investigating issued checks from prior years, the Reno Orthopedic Clinic discovered that several entries for manually issued checks were deleted after clearing the bank. As a result of these altered entries, numerous accounts showed zero balances when they should have shown a credit due.

On March 19, 2002, prior to Neubecker's arrest, Officer Randy Houston from the Reno Police Department interviewed him. At the beginning of the interview, Officer Houston advised Neubecker of his Miranda<sup>1</sup> rights. After hearing his rights, Neubecker voluntarily waived them by signing an admonition waiver of rights form. Once this form was

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<sup>1</sup>See Miranda v. Arizona, 384 U.S. 436 (1966).

signed, Officer Houston began a video-taped interrogation. During this interrogation, Neubecker admitted to drafting the manual checks, falsifying the Reno Orthopedic Clinic's records, and depositing stolen money into his personal bank account. Further, Neubecker confessed that he formed CDS and Credit Discovery Services of Nevada to wrongfully obtain money from the Reno Orthopedic Clinic to pay his gambling and credit card debts. Subsequent to his confession, Neubecker was arrested.

Prior to the March 19, 2002, interview, Officer Houston contacted the Washoe County District Attorney's Office to seek an increased bail amount for Neubecker. The justice court set bail at \$150,000 cash only, but subsequently reduced it to \$10,000 cash only.

On July 18, 2002, Neubecker filed a motion to disqualify Judge Janet Berry since her husband, David Berry, M.D., is the president of Western Physicians Alliance, a group to which many Reno Orthopedic Clinic physicians belong. On July 25, 2002, Judge Brent Adams held a hearing to address Neubecker's motion to disqualify. Upon hearing arguments, Judge Adams concluded that a professional relationship existed between Dr. Berry and some of the Reno Orthopedic Clinic doctors. Notwithstanding, Judge Adams held that this relationship would not affect any of the parties' interests. As a result, the motion to disqualify was denied.

Neubecker appeals, contending that (1) the district court erred by engaging in a secret ex parte meeting which resulted in the court increasing his bail by 60,000 percent; (2) the district attorney's office is illegally holding his \$10,000 bail; (3) the district court abused its discretion in denying his motion to disqualify Judge Berry; (4) the statute of limitations had expired on his crimes; (5) the district court erred in

failing to dismiss the charges for lack of probable cause; (6) the district court abused its discretion in denying his motion for a continuance; (7) he suffered prejudice because he was prohibited from cross-examining witnesses; and (8) the district court abused its discretion in sentencing him. We disagree

#### Secret communication

The record indicates that the district attorney had not filed the complaint at the time of the alleged ex-parte communication. During the preliminary hearing, the justice court questioned Neubecker's attorney regarding the alleged secret communication. The justice court asked, "[I]s there any proven knowledge that . . . Judge Albright knew that his brother represents or works for or is a CPA for that organization Mr. Neubecker worked for?" Neubecker's attorney answered, "That I don't know." Because no evidence in the record indicates that this secret communication took place or that Judge Albright knew that his brother worked for the Reno Orthopedic Clinic, Neubecker's argument is without merit. Even if a conversation did take place, the judge setting bail is permitted to speak with police officers before setting bail. Therefore, the justice court did not abuse its discretion in setting Neubecker's bail.

#### Retention of bail

In Maiola v. State, the police arrested James Maiola after detectives conducted a search of Maiola's residence pursuant to a warrant.<sup>2</sup> At that time, the police took \$543 from Maiola's person and a .22 caliber rifle from his bedroom. The district attorney filed a civil complaint seeking forfeiture of Maiola's property under NRS 453.301.

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<sup>2</sup>120 Nev. \_\_\_, 99 P.3d 227 (2004).

Because the district attorney was unable to serve Maiola with process, a notice of the forfeiture proceedings was published in the Nevada Legal News. The district court subsequently entered a default judgment against Maiola even though the district attorney was present with Maiola during a preliminary hearing on the criminal charges.<sup>3</sup>

In the criminal proceedings, the district court ordered that all evidence obtained from Maiola was the result of an unlawful search. However, because the forfeiture proceedings had previously concluded, the district court denied Maiola the return of his property.<sup>4</sup> This court determined that the district court had jurisdiction to determine whether Maiola's forfeited property should be returned to him and reversed and remanded the case for that purpose.<sup>5</sup>

Maiola does not apply to the instant case. The facts in Maiola and the present case are completely distinguishable. Maiola dealt with an unlawful search and seizure of property and a subsequent forfeiture proceeding. Here, there is nothing in the record regarding either an unlawful search and seizure or a forfeiture proceeding. Rather, the instant case considers, among other issues, the return of \$10,000 bail. Neubecker posted \$10,000 in bail; the bail was not unlawfully seized from him.

From the \$10,000, the district court levied a \$25 administrative assessment fee and a \$150 DNA testing fee pursuant to the judgment of conviction. The district court disbursed the remaining \$9,825

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<sup>3</sup>Maiola v. State, 120 Nev. at \_\_\_, 99 P.3d at 228.

<sup>4</sup>Id. at \_\_\_, 99 P.3d at 229.

<sup>5</sup>Id. at \_\_\_, 99 P.3d at 231.

to the prosecutor's office for payment of restitution. Neubecker filed a motion to obtain the \$10,000 six months after the judgment of conviction was filed.

The district court denied Neubecker's motion to return bail because at sentencing (1) Neubecker's attorney expressly stated that the district court could use the bail for restitution, and (2) Neubecker's attorney agreed to the same shortly thereafter. Neubecker's attorney stated, "This restitution plan, the \$10,000 that was put up for him cash bail . . . would immediately go to pay restitution to the parties." Additionally, the district court stated, "Mr. Weiner, the court is going to post and forfeit all of the fines and fees and any restitution from the cash bail posted." Neubecker's attorney did not object to this statement by the district court. Failure to object precludes appellate review.<sup>6</sup>

In Martinez v. State of Nevada, we held that "no statutory provision authorizes the application of bail money to satisfy restitution."<sup>7</sup> Neubecker's case, however, is distinguishable since he expressly permitted the district court to use the posted bail to pay restitution. Further, Neubecker's attorney failed to object when the district court specifically told him that the bail would be used for restitution. Neither Maiola nor Martinez applies to the present case.

Denial of motion to disqualify

"A judge's decision not to recuse himself voluntarily is given 'substantial weight' and will be affirmed absent an abuse of discretion.

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<sup>6</sup>Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001).

<sup>7</sup>120 Nev. 200, 202, 88 P.3d 825, 827 (2004).

The burden is on the party asserting the challenge to establish sufficient facts warranting disqualification.”<sup>8</sup>

Neubecker moved the district court to disqualify Judge Berry because allegedly her husband had a business relationship with the doctors from the Reno Orthopedic Clinic. Judge Berry filed an answer to Neubecker’s motion to disqualify which stated that she had no actual or implied bias nor did she have any financial interest in the outcome of the case.

On July 25, 2002, Judge Brent Adams held a hearing on Neubecker’s motion to disqualify Judge Berry. Neubecker asserted that the physicians of the Reno Orthopedic Clinic were members of the Western Physicians Alliance, where Judge Berry’s husband served as president. James Graham Sanford, the attorney who formed Western Physicians Alliance, testified that the organization was a non-profit corporation whose objective was to create collective bargaining with health insurance companies. Sanford testified that there was no direct connection between Western Physicians Alliance, Dr. Berry, and the Reno Orthopedic Clinic.

Judge Berry testified that she had no bias, interest in the case, or prejudice against Neubecker. Judge Berry further testified that her husband did not have a financial interest in the case nor did he have a personal friendship with any of the Reno Orthopedic Clinic physicians. The district court determined that there was no evidence that Judge Berry was partial or biased in the instant case.

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<sup>8</sup>Kirksey v. State, 112 Nev. 980, 1006, 923 P.2d 1102, 1118 (1996).

Throughout the entire hearing, Neubecker presented no evidence that Judge Berry was biased in any way. By failing to present evidence of how Judge Berry was prejudiced against him, Neubecker failed to meet his burden.<sup>9</sup> Therefore, the district court did not abuse its discretion in determining that Judge Berry was fair and impartial.

Statute of limitations

We have held that “[s]tatutes of limitation ordinarily begin to run when a crime has been completed.”<sup>10</sup> “A crime is complete as soon as every element in the crime occurs.”<sup>11</sup> “[A] crime is done in a secret manner, under NRS 171.095, when it is committed in a deliberately surreptitious manner that is intended to and does keep all but those committing the crime unaware that an offense has been committed.”<sup>12</sup> For purposes of tolling the statute of limitations, the State bears the burden of establishing by a preponderance of the evidence that the crimes were committed in a secret manner.<sup>13</sup> Further, exceptions to criminal statute of

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<sup>9</sup>Id.

<sup>10</sup>Woolsey v. State, 111 Nev. 1440, 1443, 906 P.2d 723, 726 (1995) (quoting Campbell v. District Court, 101 Nev. 718, 722, 710 P.2d 70, 72 (1985)).

<sup>11</sup>U.S. v. Musacchio, 968 F.2d 782, 790 (9th Cir. 1991).

<sup>12</sup>Walstrom v. State, 104 Nev. 51, 56, 752 P.2d 225, 228 (1988), overruled on other grounds by Hubbard v. State, 112 Nev. 946, 920 P.2d 991 (1996).

<sup>13</sup>Houtz v. State, 111 Nev. 457, 459, 893 P.2d 355, 356 (1995); Walstrom, 104 Nev. at 54, 752 P.2d at 227.

limitations are “narrowly construed and read in a light most favorable to the accused.”<sup>14</sup>

The thefts Neubecker committed, embezzling funds from his employer by disguising them as refunds to insurance companies, can be and were committed in a secret manner. Neubecker secretly disguised his theft by taking the refunds that the Reno Orthopedic Clinic should have paid to insurance companies or private individuals. He created the fictitious companies named Credit Discovery Services and Credit Discovery Services of Nevada so that he could “fool” the physicians into believing that the payments were legitimate. Neubecker’s own confession is evidence that he stole the money in a secret and surreptitious manner. He concealed his theft so well that the Reno Orthopedic Clinic did not discover it until 2001. Based on these facts, the State met its burden of proving by a preponderance of the evidence that Neubecker committed the crimes in a secret manner. Therefore, the district court did not err by failing to dismiss these twelve counts.

#### Admissible evidence

Probable cause may be established using reasonable inferences from circumstantial evidence.<sup>15</sup> We will uphold a finding of probable cause even if such evidence is only slight or marginal.<sup>16</sup>

On August 19, 2002, Neubecker filed a motion with the district court to dismiss for lack of probable cause. On October 8, 2002,

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<sup>14</sup>Walstrom, 104 Nev. at 53-54, 752 P.2d at 227; see also Houtz, 111 Nev. at 462, 893 P.2d at 358.

<sup>15</sup>Sheriff v. Richardson, 103 Nev. 180, 183, 734 P.2d 735, 737 (1987).

<sup>16</sup>Id.; Sheriff v. Badillo, 95 Nev. 593, 594, 600 P.2d 221, 222 (1979).



the district court denied Neubecker's motion. Neubecker alleged that the State had failed to advance sufficient evidence during the preliminary hearing to establish probable cause that Neubecker committed any of the charged crimes. Neubecker now reasserts the same claims raised in previous petitions challenging the pre-trial proceedings.

Ms. Debra Benson, an accounting specialist for Reno Orthopedic Clinic, testified that she discovered discrepancies on more than twenty refund checks at the clinic. Benson noticed that these checks were manually issued and did not have the standard stamped endorsement. Further, Benson testified that several entries for these manually issued checks were deleted after clearing the bank. As a result of these altered entries, numerous accounts showed zero balances when they should have shown a credit due. Her analysis of these false entries showed a pattern of posting discrepancies which corresponded to checks made payable to Credit Discovery Services (CDS), Chase, and Advanta. Benson also discovered that some of the suspect checks made payable to Chase had a sixteen-digit credit card number written on them.

The State also introduced into evidence the certificates for the fictitious names of Credit Discovery Services and Credit Discovery Services of Nevada. Neubecker had obtained both certificates. In addition, the State introduced certified copies of Neubecker's credit card records with Chase showing the same sixteen-digit credit card number Benson discovered on several of the checks. The State showed that several check amounts corresponded with Neubecker's credit card statements. The State argued during the preliminary hearing that the documents were admissible as business records. These documents were accompanied by an affidavit signed by a custodian of records from Chase. Neubecker objected

to this evidence as hearsay and because the custodian did not completely fill out the affidavit. The State responded, stating that the documents laid a foundation for business records and that they were trustworthy and reliable; therefore, they fell within the hearsay exception. The justice court determined that the documents were trustworthy and, therefore, admissible.

We determine that there was more than mere circumstantial evidence introduced during the preliminary hearing to establish probable cause. The evidence introduced was admissible under the business records exception and the general hearsay exception where evidence has indications of trustworthiness.<sup>17</sup> This evidence, combined with Neubecker's confession, provides substantial evidence of probable cause. Therefore, the justice court properly admitted the State's evidence during the preliminary hearing.

Amended information

"The State is required to give adequate notice to the accused of the various theories of prosecution."<sup>18</sup> NRS 173.095 allows the amendment of an information "if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." "Amendment of the information prior to trial is an appropriate method for giving the accused the notice to which he or she is entitled."<sup>19</sup>

On April 25, 2002, the State gave Neubecker notice of its theories of prosecution on the twenty-three counts of theft. The district

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<sup>17</sup>NRS 52.015; NRS 52.260.

<sup>18</sup>State v. Dist. Ct., 116 Nev. 374, 377, 997 P.2d 126, 129 (2000).

<sup>19</sup>Id. at 378, 997 P.2d at 129.

court had scheduled the trial to begin in November 2002. The State amended the information because Neubecker claimed that all the subsections of the theft statutes needed to be set forth. The amended information did not change the State's theories or add any additional counts. Finally, Neubecker fails to demonstrate how he was prejudiced by the district court's ruling. Since none of the charges against him were altered and none were added, Neubecker had ample notice of the charges against him and sufficient time to prepare a defense for trial. The district court did not err in allowing the State to file the amended information because NRS 173.095 provides for amendments, no additional charge was set forth, and Neubecker was not prejudiced by the changes.

Denial of Neubecker's motion for a continuance

"It is well settled that '[t]he granting of a continuance is within the sound discretion of the [trial] court.'"<sup>20</sup> Unless the appellant is able to show an abuse of discretion, this court will not disturb the district court's decision.<sup>21</sup>

On November 1, 2003, the Friday before trial, Neubecker filed a motion for continuance in the district court so he could respond to the court's denial of his motion to dismiss. The district court denied Neubecker's motion because he already had notice of the charges against him and Neubecker did not present an adequate reason for the continuance. In addition, the district court had previously granted Neubecker's prior motion for a continuance.

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<sup>20</sup>Doyle v. State, 104 Nev. 729, 731, 765 P.2d 1156, 1157 (1988) (quoting Dixon v. State, 94 Nev. 662, 664, 584 P.2d 693, 694 (1978)).

<sup>21</sup>Id.

Neubecker has not demonstrated how the district court abused its discretion in denying the motion. The district court had previously granted Neubecker a continuance and did not consider this motion to be warranted under the circumstances. Neubecker has also failed to show how he was prejudiced by the denial of his motion to continue. Therefore, the district court did not abuse its discretion in denying Neubecker's motion for a continuance.

Ability to cross-examine witnesses

"[T]he accused at a preliminary examination has the right to cross examine witnesses against him and to introduce evidence in his own behalf."<sup>22</sup> However, when Neubecker signed the guilty plea memorandum, he openly acknowledged that he waived his right to confront his accusers and to cross-examine all witnesses. Neubecker was represented by counsel during all stages of the case below. Prior to pleading guilty, Neubecker's attorney cross-examined witnesses and presented his theories of defense during the preliminary hearing. Neubecker and his attorney signed the guilty plea memorandum wherein Neubecker acknowledged that he waived his right to cross-examine witnesses.

Based on the record, Neubecker knew that by pleading guilty he waived his right to cross-examine witnesses and present his theory of defense. Because Neubecker waived the right to cross-examine witnesses, he was not prejudiced.

Sentencing

"A sentencing judge is allowed wide discretion in imposing a sentence; absent an abuse of discretion, the district court's determination

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<sup>22</sup>Sheriff v. Vasile, 96 Nev. 5, 7, 604 P.2d 809, 810 (1980).

will not be disturbed on appeal.”<sup>23</sup> This court will refrain from interfering with the sentence imposed “[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.”<sup>24</sup> The district court does not have to grant Neubecker credit for the time he was subject to house arrest.<sup>25</sup>

After Neubecker pleaded guilty, the district court sentenced him to three prison terms with a minimum of two years to a maximum of five years per term. Neubecker’s sentence was within the sentencing guidelines, and he does not allege that his sentence was the result of impalpable or highly suspect evidence. Additionally, while Neubecker was under house arrest, he was permitted to leave his home to go to work, attend Gamblers Anonymous meetings, and even go to a coffee shop and video store. Accordingly, the district court did not abuse its discretion in sentencing Neubecker.

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<sup>23</sup>Brown v. State, 113 Nev. 275, 287, 934 P.2d 235, 243 (1997) (quoting Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993)).

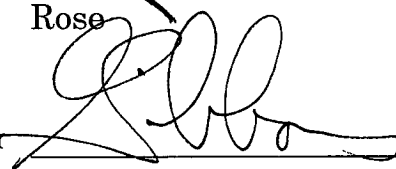
<sup>24</sup>Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

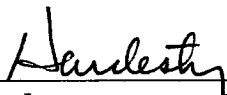
<sup>25</sup>Webster v. State, 109 Nev. 1084, 1085, 864 P.2d 294, 295 (1993).

We conclude that neither the justice court nor the district court abused its discretion or erred in Neubecker's pre-trial proceedings.<sup>26</sup> Accordingly, we

ORDER the judgment of the district court AFFIRMED.

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

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Janet J. Berry, District Judge  
Martin H. Wiener  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>26</sup>We have reviewed Neubecker's other arguments and conclude they are without merit.