IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSE ZAMORA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41272

FILED

MAR 17 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction pursuant to a jury verdict of one count of trafficking in a controlled substance, a category B felony. Sixth Judicial District Court, Humboldt County; Richard Wagner, Judge.

On October 28, 2002, Officers Lee Dove and Chris Lininger, deputy sheriffs in Humboldt County, were traveling on Melarkey Street in Winnemucca when Officer Dove noticed three people in an approaching white pickup truck. Officer Lininger informed Officer Dove that the truck's front license plate was not properly mounted and was hanging down. Officers Dove and Lininger decided to stop the truck based on the license plate violation.

As Officers Dove and Lininger caught up with the vehicle, the truck veered out of its lane and crossed the yellow center line for about three to five car lengths. The driver of the truck committed another traffic violation and the police pulled the vehicle over. There were three individuals in the truck. Zamora was in the right front passenger seat. Officer Dove returned to the patrol car to perform a wants and warrants check. The police dispatch notified Officer Dove that there was an outstanding warrant for the woman passenger's arrest.

Based on this information, Officer Lininger told Zamora to stand in front of the truck so the woman could exit. Officer Lininger then instructed the woman to exit the truck and placed her into custody. At that moment, Officer Dove saw Zamora duck in front of the truck. Officer Dove yelled at Zamora, instructing him to come out from hiding and show his hands. Zamora came out from in front of the truck and threw a bag containing a white substance toward the sagebrush. Officer Dove asked Zamora what he was doing, to which Zamora replied, "It's just a little marijuana." Officer Dove then took Zamora into custody and retrieved the bag Zamora threw. Officer Dove conducted a field test on the substance in the bag that confirmed it was methamphetamine.

The State originally charged Zamora with one count of possession of a controlled substance by information. The State later amended the information to one count of trafficking in a controlled substance because the quantity involved was more than four grams of methamphetamine.

On December 16, 2002, the district court conducted the arraignment. After asking Zamora routine questions about the nature of the charges and Zamora's satisfaction with the defense attorney, the district court noted that "[Zamora] has continually kept his eyes closed and has been somewhat unresponsive. But from time to time, he will respond after a period of time." Zamora's brother and mother attended the arraignment and informed the court that Zamora heard voices, was previously hospitalized, and had been treated for psychological disorders.[1]

---

[1]Throughout the course of Zamora's proceedings, defense counsel never admitted any evidence of Zamora's alleged hospitalization or treatment for psychological problems.

Officer Smock, a prison guard, indicated that Zamora engaged in adolescent behavior and threw fits "that a little kid would have." Zamora's attorney, however, indicated that he thought Zamora understood him and stated they had rationally discussed the charges against Zamora. The district court then determined that Zamora could cooperate if he wished. Defense counsel also agreed that he believed Zamora to be competent and that Zamora understood the charges against him. Zamora had agreed to plead guilty to possession of methamphetamine in exchange for a lesser charge. However, because Zamora did not cooperate with the district court, the court entered a plea of not guilty on Zamora's behalf.

On January 9, 2003, after a two-day trial, the jury found Zamora guilty of trafficking in a controlled substance, a category B felony. On February 7, 2003, defense counsel filed a motion for examination and to stay sentencing. On February 19, 2003, the district court conducted a hearing on the motion. The district court denied the motion, finding that Zamora was able to understand the nature of the criminal charge and knew why he was in trouble.

The court sentenced Zamora to twenty-four to sixty months in prison. Pursuant to NRS 176.0913, the court also ordered Zamora to submit a biological sample for DNA analysis. Zamora appeals the judgment of conviction.

Competency to stand trial

Zamora argues that the district court erred in finding that he was competent to stand trial. Zamora also argues that a psychiatrist or psychologist should have examined him instead of a medical doctor. We disagree.

In Godinez v. Moran, the United States Supreme Court concluded that the standard for competency to stand trial is a "modest" one that "seeks to ensure that [the defendant] has the capacity to understand the proceedings and to assist counsel."[2] In essence, Godinez reiterated the competency standard set forth in Dusky v. United States.[3] In Dusky, the United States Supreme Court held that

> it is not enough for the district judge to find that "the defendant [is] oriented to time and place and [has] some recollection of events," but that the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."[4]

Nevada's standard for competency to stand trial is analogous to the Dusky standard.[5] We have held that a person is competent to stand trial if he is capable of comprehending the criminal charges against him and able to assist his counsel in his defense.[6] In addition, a defendant may demonstrate his competence either by an express affirmation or by an "admission of the facts constituting the offense."[7] We review a district

---

[2]509 U.S. 389, 402 (1993).

[3]362 U.S. 402, 402 (1960).

[4]Id. (quoting 18 U.S.C. § 4244 (1949)).

[5]See Hill v. State, 114 Nev. 169, 176, 953 P.2d 1077, 1082 (1998).

[6]Id.

[7]Iverson v. State, 107 Nev. 94, 99, 807 P.2d 1372, 1375 (1991).

court's finding that a defendant was competent to stand trial for substantial evidence.[8]

Before the trial commenced, the district court reviewed Zamora's medical report with counsel. Dr. Tsui, the doctor who examined Zamora, gave his opinion that Zamora was "all right." Dr. Tsui stated that Zamora understood him and was medically "okay." Although Dr. Tsui was "a bit hesitant to offer a psychological evaluation," he indicated that Zamora asked and answered questions appropriately. Based on this evidence, the district court concluded that there was "no reason . . . to believe that the defendant is not capable of assisting his attorney during the trial or that there's any issue as to competency in this matter."

Because substantial evidence from the proceedings below indicates that Zamora understood the nature of the charges against him, the district court's finding that Zamora was competent to stand trial was not an abuse of discretion. Zamora was not incompetent to stand trial simply because he chose not to cooperate during certain portions of the proceedings. We conclude that based on the holding in Godinez, substantial evidence existed to support the district court's determination that Zamora was competent to stand trial.

Motion to suppress evidence

In Gama v. State, an officer pulled a vehicle over for an observed infraction. In Gama, we acknowledged that the "would have" test was discredited by the United States Supreme Court's ruling in

---

[8]Tanksley v. State, 113 Nev. 844, 847, 944 P.2d 240, 242 (1997).

Whren v. United States.[9] Under the "would have" test, a stop was impermissibly pretextual unless a reasonable officer would have made the stop absent the invalid purpose.[10] We determined in Gama that the "could have" test was the proper test to apply where a claim of pretext is made.[11] Under the "could have" test, "a vehicle stop that is supported by probable cause to believe that the driver has committed a traffic infraction is 'reasonable' under the Fourth Amendment, even if a reasonable officer would not have made the stop absent some purpose unrelated to traffic enforcement."[12] Bec ause the police in the instant case witnessed two traffic violations, probable cause to stop the vehicle existed and the police easily satisfied the "could have" test. Therefore, we conclude that the district court did not err in denying Zamora's motion to suppress the methamphetamine.

Reasonable doubt instruction

In Elvik v. State, we examined the constitutionality of a similar reasonable doubt jury instruction.[13] The instruction in Elvik stated:

> "A reasonable doubt is one based on reason. It is not mere possible doubt, but it is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors,

---

[9]517 U.S. 806 (1996); see Gama v. State, 112 Nev. at 836, 920 P.2d at 1012-13.

[10]Gama, 112 Nev. at 836, 920 P.2d at 1012-13.

[11]Id. at 836-37, 920 P.2d at 1013.

[12]Id. at 836, 920 P.2d at 1012-13.

[13]114 Nev. 883, 897, 965 P.2d 281, 290 (1998).

> after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation."[14]

We reasoned that the instruction was "a verbatim excerpt of language appearing in NRS 175.211."[15] Holding that the instruction did not violate the defendant's due process rights, we determined Elvik's argument was without merit.[16]

Zamora argues that the last part of the reasonable doubt instruction in the instant case tends to mislead the jury. Jury instruction number eighteen stated, in part, that

> [i]f you are satisfied of the defendant's guilt, beyond a reasonable doubt, it matters not whether your judgment is based upon direct and positive evidence or on indirect and circumstantial evidence, or upon both.

We upheld the specific wording of jury instruction eighteen in Crane v. State "because direct evidence, as well as circumstantial evidence, was introduced during the trial."[17]

In the instant case, instruction eighteen was necessary because the prosecution presented circumstantial evidence as well as direct evidence at trial. Because Zamora never admitted that he knowingly possessed methamphetamine, the circumstantial evidence that

---

[14]Id.

[15]Id. at 898, 965 P.2d at 290.

[16]Id. at 898, 965 P.2d at 290-91.

[17]88 Nev. 684, 687, 504 P.2d 12, 14 (1972).

Zamora knew he possessed the drug was necessary for the jury to consider. Additionally, the jury should be free to determine from both direct and circumstantial evidence whether Zamora was guilty beyond a reasonable doubt. Because the reasonable doubt jury instruction used in the instant case was proper, we uphold this instruction as constitutional.

"Equal and exact justice" instruction

In Leonard v. State, we reviewed the "equal and exact justice" instruction and reasoned that

> [t]his instruction does not concern the presumption of innocence or burden of proof. A separate instruction informed the jury that the defendant is presumed innocent until the contrary is proven and that the state has the burden of proving beyond a reasonable doubt every material element of the crime and that the defendant is the person who committed the offense. [18]

We then held that Leonard was not denied the presumption of innocence.[19]

Leonard is analogous to the instant case. The jury in the instant case received jury instruction number six, which specifically stated: "A defendant is presumed to be innocent until the contrary is proved." Instruction number six also stated that the presumption of innocence "places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the defendant is the person who committed the offense." As in Leonard, Zamora was not denied the presumption of innocence by the "exact and

---

[18]114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998).

[19]Id.

equal justice" instruction because the jury received another instruction specifically stating the presumption of innocence and the State's burden of proof. Therefore, we conclude that the "exact and equal justice" instruction did not eliminate Zamora's presumption of innocence and we uphold this instruction as constitutional.

Sufficiency of the evidence

It is for the jury to determine the weight and credibility to give testimony.[20] When substantial evidence supports the jury's verdict, we will not disturb it on appeal.[21] "The question for the reviewing court 'is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[22] "'This court is not a fact-finding tribunal; that function is best performed by the district court.'"[23]

The State presented substantial evidence to support a guilty verdict. Officer Dove testified that Zamora was seated in the truck as the right front passenger. After exiting the vehicle, Zamora ducked in front of the truck where the police could not see him. Officer Dove prepared for active aggression from Zamora and demanded that Zamora stand up and show his hands. As Zamora stood up and began walking toward Officer Dove, Zamora threw a bag containing a white substance away from

---

[20]Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002).

[21]Id.

[22]Id. (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[23]Peck v. State, 116 Nev. 840, 846, 7 P.3d 470, 474 (2000) (quoting Zugel v. Miller, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983)).

himself. When Officer Dove asked Zamora what he was doing, Zamora replied, "It's just a little marijuana." Officer Dove conducted a field test on the substance in the bag which indicated that the substance was methamphetamine.

Officer Lininger also testified that he saw Zamora throw away a bag containing a white substance. Officer Lininger was only sixteen or seventeen feet away from Zamora when he saw this happen. Maria Fasset, an expert criminalist from the Washoe County Crime Laboratory, testified that she examined the white substance that Officers Dove and Lininger recovered from Zamora. Fasset determined that the weight of the methamphetamine was 9.03 grams. This evidence was sufficient for a jury to determine that Zamora was guilty of trafficking in a controlled substance. Because the prosecutor presented sufficient evidence, Zamora's insufficient evidence argument is wholly without merit.

Constitutionality of mandatory DNA testing of convicted persons

Zamora urges this court to follow the United States Court of Appeals for the Ninth Circuit case of United States v. Kincade where the court recently found a federal mandatory DNA testing statute unconstitutional.[24] We decline to follow Kincade because the Ninth Circuit has vacated the opinion. Furthermore, we conclude that Nevada's statute and precedent control.

NRS 176.0913 requires certain convicted individuals to submit a biological specimen to determine genetic markers. The purpose of the statute is to identify people who have committed specific crimes. We have

---

[24]345 F.3d 1095 (9th Cir. 2003), vacated by U.S. v. Kincade, 354 F.3d 1000 (9th Cir. 2004).

previously analyzed this issue and upheld the imposition of mandatory DNA genetic marker testing for a convicted person under NRS 176.0913.[25] Addressing an equal protection challenge, we held that "a convicted person has no fundamental right to be free from DNA genetic marker testing" and determined that the rational basis level of scrutiny applied.[26] We also held that NRS 176.0913 was not overbroad, did not violate the Eighth Amendment of the United States Constitution, and did not offend due process.[27] We have previously upheld the constitutionality of NRS 176.0913 in Gaines v. State.[28]

In the instant case, a jury convicted Zamora of a category B felony, trafficking in a controlled substance.[29] As directed by NRS 176.0913, the district court ordered Zamora to submit a biological sample to determine his genetic markers. Because the district court followed NRS 176.0913 as upheld in Gaines, we conclude that Zamora's argument lacks merit. We also affirm our holding in Gaines that the imposition of mandatory DNA genetic marker testing for a convicted person is constitutional.

CONCLUSION

We first conclude that substantial evidence supports the determination that Zamora was competent to stand trial and that the

---

[25]Gaines v. State, 116 Nev. 359, 371, 998 P.2d 166, 174 (2000).

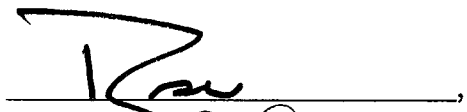
[26]Id.

[27]Id. at 372-74, 998 P.2d at 174-75.

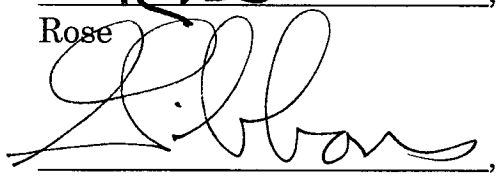
[28]116 Nev. 359, 998 P.2d 166 (2000).

[29]NRS 453.3385(1).

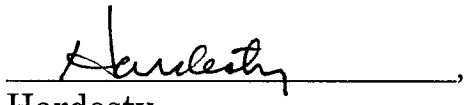
district court's denial of Zamora's motion to suppress was proper. The State's evidence introduced at trial was relevant and did not unduly prejudice Zamora. Further, we conclude that the two jury instructions were constitutional and that the prosecution presented sufficient evidence for a reasonable jury to convict Zamora as charged. Finally, we conclude that, under Gaines v. State,[30] the district court properly ordered Zamora to submit a biological sample for DNA testing. We, therefore, affirm the district court's judgment.[31]



_____, J.
Rose



_____, J.
Gibbons



_____, J.
Hardesty

cc: Hon. Richard Wagner, District Judge
State Public Defender/Carson City
Attorney General Brian Sandoval/Carson City
Humboldt County District Attorney
Humboldt County Clerk

---

[30]116 Nev. 359, 998 P.2d 166.

[31]We have considered Zamora's other arguments and conclude they are without merit.