

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANCISCO AGUILAR MENDEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41902

FILED

MAY 18 2005

JANET L. GLOOM
CLERK OF SUPREME COURT
BY *J. B. [Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction upon a jury verdict for separate counts of trafficking in a controlled substance, level II, and trafficking in a controlled substance, level III. Sixth Judicial District Court, Humboldt County; John M. Iroz, Judge.

Police arrested appellant Francisco Aguilar Mendez after a confidential informant, Alberto Lara, contacted them, offered assistance, and performed two separate drug buys from Mendez. Lara was paid for each transaction.

Two days prior to trial, Deputy Public Defender Robert Dolan informed the court that he intended to act as co-counsel with Deputy Public Defender J. Rayner Kjeldsen on the Mendez trial. Dolan, however, was also representing a possible rebuttal witness for the State in the Mendez trial and, therefore, moved to withdraw the Public Defender's Office as Mendez's counsel. The district court granted the motion as to Dolan only, and ordered Kjeldsen to remain as Mendez's counsel.

On the first day of trial, Mendez informed the court that he had retained a private attorney and moved for a continuance of the jury trial in order for his new attorney to prepare. The district court denied his motion, and the trial proceeded with Kjeldsen as counsel. The jury found Mendez guilty on both trafficking counts.

Mendez appeals, arguing that his right to confront witnesses was violated when he was not allowed to question Lara on the compensation Lara received from police on other confidential informant activities, that the State's failure to disclose the amount of compensation was a Brady violation, that Mendez's counsel had a potential conflict of interest requiring a new trial, that Mendez's due process rights were violated when he was not allowed to participate in an in-chambers discussion about the potential conflict, and that Mendez's right to counsel of choice was violated when the district court denied his request for a continuance.

Right to confrontation

Mendez argues that the district court erred when it denied his discovery request for evidence of all of Lara's confidential informant work for the State. At a hearing on the discovery request, the State agreed to provide information relating to the Mendez case; however, it stated that information pertaining to Lara's other informant activities was not relevant. The district court agreed and denied Mendez's request for information on Lara's other confidential informant cases.

Mendez contends that evidence of Lara's services to the State on other cases was relevant to demonstrate that Lara was not a credible witness.¹ Under NRS 48.015, "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Mendez has failed to establish how Lara's other

¹Ransey v. State, 100 Nev. 277, 279, 680 P.2d 596, 597 (1984); see also Davis v. Alaska, 415 U.S. 308, 316-17 (1974) (stating that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination").

informant activities are relevant to the charges against him or how evidence of Lara's other informant activities impeaches Lara's testimony. Moreover, at trial, Mendez was permitted to cross-examine Lara on his informant activities on the Mendez case and his motivation for testifying for the State. Mendez's contentions that a police officer was permitted to testify that Lara was an altruistic volunteer and that Lara also held himself out as a volunteer are belied by the record. Additionally, both the law enforcement officers and Lara testified consistently.

Next, Mendez argues that this information was exculpatory and that the State violated Brady v. Maryland when it refused to disclose the evidence.² Brady held that the State must disclose favorable evidence to the defense when that evidence is material to guilt or punishment.³ This court has held that evidence is material where a reasonable possibility exists that the claimed evidence would have affected the judgment of the trier of fact, and thus, the outcome of the trial.⁴ The State points out that the jury was exposed to evidence of Lara's employment situation and his compensation for the two buys in this case. As the State notes, Mendez has failed to demonstrate how this evidence would have affected the jury's decision. Accordingly, this argument is without merit.

Conflict of interest

Mendez contends that the district court erred by denying the motion to withdraw the entire public defender office because SCR 160(1) requires that the district court impute disqualification to the entire office.

²373 U.S. 83 (1963).

³Id. at 87.

⁴Evans v. State, 117 Nev. 609, 626, 28 P.3d 498, 510 (2001).

In the present case, the district court conducted a hearing to ascertain the risks of any conflict. The district court also inquired into Deputy Public Defender Kjeldsen's knowledge and representation of the State's possible rebuttal witness, Dario Gezar. The district court accepted Kjeldsen's and Deputy Public Defender Dolan's assertion that Kjeldsen had not acquired any confidential information from Gezar. Kjeldsen had been Mendez's exclusive counsel since the beginning of the case. Determining that the risk of potential conflict was low given that confidential information was not exchanged and finding that disruption to the proceedings was certain, the district court granted the motion to withdraw as to Dolan only and ordered that Kjeldsen remain on the case. Thus, it appears that the district court acted within Sixth Amendment principles concerning conflict-free counsel, and because Gezar did not testify at trial, there was no actual conflict of interest.⁵ Therefore, Mendez's argument is without merit.

Due process

The day before trial, the State and defense counsel had an in-chambers meeting, without Mendez, to discuss a potential conflict of interest. On the morning of trial, the district court held a hearing to discuss the issue. Mendez argues that the meeting violated his due process right because he was not present. We disagree. There is no evidence that the district court took any action at the meeting, and the district court summarized what occurred at the meeting at the hearing the next day. Additionally, there is no evidence that the meeting prejudiced

⁵Wood v Georgia, 450 U.S. 261, 271 (1981) (holding that there is a right to conflict free representation).

Mendez, nor did Mendez demonstrate any evidence of wrongdoing by either party or the district court.

Continuance

Mendez contends that the district court abused its discretion when it denied his motion for a continuance, thereby preventing Mendez from using new counsel. Quoting the Second Circuit Court of Appeals in United States v. Monsanto, Mendez argues that “the sixth amendment right to counsel includes a right to privately retained counsel of choice.”⁶ “An accused who is financially able to retain counsel must not be deprived of the opportunity to do so.”⁷ In Monsanto, the Court went on to state that “[i]t is equally clear, however, that the right to counsel of choice is qualified, and can be outweighed by countervailing governmental interests.”⁸ It is within the district court’s sound discretion whether to grant a continuance.⁹

The facts reveal that Mendez had requested continuances on several occasions based on his intent to retain private counsel, but had repeatedly failed to do so. Mendez had requested numerous continuances up to the first day of trial and even after the jury was impaneled. In its discretion, the district court determined that Mendez had a reasonable time within which to retain a private attorney and, therefore, denied his requests. The district court also noted Kjeldsen’s experience and the fact

⁶836 F.2d 74, 80 (2d Cir. 1987), overruled on other grounds by United States v Monsanto, 491 U.S. 600, 606-07 (1989).

⁷Id. (quoting United States v. Burton, 584 F.2d 485, 489 (D.C. Cir. 1978)).

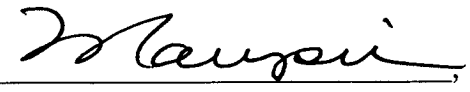
⁸Id.

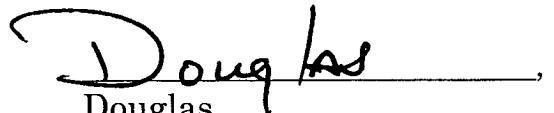
⁹Doleman v. State, 107 Nev. 409, 416, 812 P.2d 1287, 1291 (1991).

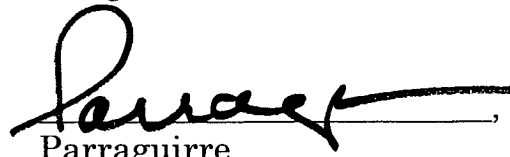
that Kjedsen exclusively was familiar with Mendez's case and that Mendez was not prejudiced by denial of the continuance motion. Balancing Mendez's right to choice of counsel against public interest in the orderly administration of justice, we hold that the district court did not abuse its discretion when it denied Mendez's request for new counsel and a continuance.

Accordingly we,

ORDER the judgment of the district court AFFIRMED.

 J.
Maupin

 J.
Douglas

 J.
Parraguirre

cc: Hon. John M. Iroz, District Judge
State Public Defender/Carson City
State Public Defender/Winnemucca
Attorney General Brian Sandoval/Carson City
Humboldt County District Attorney
Humboldt County Clerk