

IN THE SUPREME COURT OF THE STATE OF NEVADA

PEDRO DUARTE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42256

FILED

JUN 15 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction pursuant to a jury verdict. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Appellant Pedro Duarte was convicted of conspiracy to commit robbery and/or murder, attempted murder with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, and possession of a stolen vehicle resulting from a robbery of an armored vehicle outside a Las Vegas hotel/casino. During the robbery, Duarte and his co-defendants opened fire on Brinks armored guards before fleeing in a stolen vehicle to another local hotel parking lot. Following the robbery, police questioned Duarte regarding his earlier reporting of his stolen vehicle and conducted an extensive investigation of the crime scene. The case proceeded to a jury trial where a witness, who at an earlier hearing had positively identified Duarte, failed to make an in-trial identification.

On appeal, Duarte argues that (1) the police investigation violated his due process rights; (2) he was denied a fair trial; (3) his Fifth Amendment privilege against self-incrimination was violated; and (4) the jury verdict is not supported by substantial evidence.

DNA evidence collection was a violation of due process

The State conducted a DNA test on a water bottle found in the getaway vehicle. Duarte argues that when the State's expert submerged a water bottle mouthpiece to collect DNA evidence, Duarte was unfairly prejudiced by the destruction of the DNA on the water bottle and that the State destroyed the evidence in bad faith.

"The determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong."¹

"The Due Process Clause of the Fourteenth Amendment requires the State to disclose to criminal defendants favorable evidence that is material either to guilt or to punishment."² If a defendant seeks to have a conviction reversed based on loss of evidence, "he must show either bad faith or connivance on the part of the government or that he was prejudiced by the loss of the evidence."³ A showing of bad faith requires demonstrating the State intentionally lost or suppressed evidence.⁴ The burden of showing prejudice rests on the defense, and requires a showing "that it could be reasonably anticipated that the evidence sought would be exculpatory and material to appellant's defense."⁵

¹Bolin v. State, 114 Nev. 503, 525, 960 P.2d 784, 799 (1998) abrogated on other grounds by Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002).

²California v. Trombetta, 467 U.S. 479, 480 (1984).

³Boggs v. State, 95 Nev. 911, 912, 604 P.2d 107, 108 (1979).

⁴Id. at 913, 604 P.2d 107, 108 (1979).

⁵Id.

In California v. Trombetta, the United States Supreme Court considered California's practice of using the Intoxilyzer to test blood alcohol levels, and the argument that arresting officers failed to preserve breath sample evidence.⁶ The Court concluded that the California authorities did not destroy breath samples in a calculated effort to circumvent disclosure requirements, but were acting in good faith and in accordance with established procedure.⁷ The Court also stated that the challenged evidence must "possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."⁸ Given the Intoxilyzer's accuracy and safeguards, the Court found it unlikely that additional testing of breath samples would prove exculpatory.⁹

Here, the DNA evidence may have been destroyed when the saliva from the water bottle mouthpiece was recovered by submerging the mouthpiece in fluid, leaving little or no saliva on the bottle for independent testing. However, we conclude Duarte has failed to demonstrate bad faith by the State. The DNA expert who recovered the saliva testified that submerging the mouthpiece in fluid was the most effective DNA extraction method. Furthermore, the PCR test, the manner of DNA testing used by the State's expert, has been shown to be "reliable

⁶Trombetta, 467 U.S. at 483.

⁷Id. at 488.

⁸Id. at 489.

⁹Id.

and trustworthy for use within the forensic context;” therefore, DNA results obtained through this technique have been held to be admissible.¹⁰

Likewise, Duarte has failed to establish any prejudice given the reliability of the testing coupled with Duarte’s failure to retest the bottle to confirm the lack of any DNA evidence. Even if DNA was not present on the mouthpiece, the State’s expert froze the remaining cells obtained from the mouthpiece. Duarte could have independently tested the remaining cells and had the opportunity to challenge the State’s expert regarding the DNA testing methods.

The water bottle, the State’s raw data and frozen cells were made available to Duarte. The testing method used is standard procedure in Nevada and has been reviewed for accuracy and reliability. Under these facts, we conclude that Duarte was given a meaningful opportunity to present a complete defense, and Duarte’s due process rights were not violated.

Denial of a fair trial

Duarte argues that the identification of him at a preliminary hearing was unduly suggestive and unreliable, such that references to that identification during trial deprived Duarte of a fair trial.

In Nevada, the test for fairness of pretrial identification is whether “the confrontation conducted . . . was so unnecessarily suggestive and conducive to irreparable mistaken identification that (appellant) was denied due process of law.”¹¹ If the procedure is shown to be suggestive,

¹⁰Bolin, 114 Nev. at 528, 960 P.2d at 800 (citations omitted).

¹¹Banks v. State, 94 Nev. 90, 94, 575 P.2d 592, 595 (1978) (quoting Stovall v. Denno, 388 U.S. 293, 301-02 (1967)).

the next inquiry is whether the suggestive identification is reliable despite an unnecessarily suggestive procedure.¹² In Gehrke v. State, this court identified factors to consider in evaluating the reliability of an identification including the “witness’ opportunity to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.”¹³

During a preliminary hearing, witness John Thornberg identified one of Duarte’s co-defendants as one of three individuals he saw in the Vagabond Hotel parking lot the morning of the robbery. Counsel asked Thornberg if he recognized the man to the left of the identified co-defendant. Thornberg stated that he recognized Duarte as the driver of the getaway vehicle. Duarte argues that without any factual basis, this identification was unduly suggestive and unreliable.

Thornburg testified he heard 25 to 30 “pops” before seeing an SUV screech across into the alley where he was walking his dog. The SUV parked in the hotel parking lot right next to Thornburg’s car. Thornburg’s attention was directed to the SUV, as he worried it would hit his car. Thornburg had an unobstructed view of the passengers, who were about 30 feet away. Thornburg also testified as to what the occupants were wearing, hairstyles, height, weight and other distinctive features. Thornburg also observed the occupants moving duffel bags from the getaway vehicle into a red truck located in the parking lot.

¹²Id.

¹³96 Nev. 581, 585, 613 P.2d 1028, 1030 (1980).

Under these facts, we conclude Thornberg's identification was reliable. Furthermore, we conclude the preliminary identification was not a part of the trial, and Thornburg made no actual positive identification of Duarte during the trial. In fact, when asked whether he could identify the first person to exit the getaway vehicle, Thornburg misidentified Duarte's counsel.

We conclude the identification of Duarte during the pretrial hearing did not deprive Duarte of a fair trial or of due process of law.

Fifth Amendment privilege against self-incrimination

Duarte argues the police questioning of him outside his home and at the stationhouse was a custodial interrogation, and that he did not make a knowing, voluntary waiver of his Fifth Amendment rights.

"[A] trial court's custody and voluntariness determinations present mixed questions of law and fact subject to this court's de novo review."¹⁴ The court's purely historical factual findings regarding the interrogation are reviewed for clear error, while the court's ultimate determination of whether the person was in custody and the statement was voluntary is reviewed de novo.¹⁵

The purpose of the Miranda warning is to protect an individual's right against self-incrimination when that individual is in custody and subject to interrogation by law enforcement.¹⁶ The determination of whether a custodial interrogation has occurred requires a

¹⁴Rosky v. State, 121 Nev. ____, ____, ____ P.3d ____, ____ (Adv. Op. 22, May 26, 2005).

¹⁵Id.

¹⁶Miranda v. Arizona, 384 U.S. 436, 444-45 (1966).

court to consider the “totality of the circumstances, including the site of the interrogation, whether objective indicia of an arrest are present, and the length and form of questioning.”¹⁷

“Custody” has been interpreted to mean a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.¹⁸ If a formal arrest is not made, the inquiry is “how a reasonable man in the suspect’s position would have understood his situation.”¹⁹ An individual is not in custody for Miranda purposes, if the police are merely asking questions at the scene of the crime or where an individual questioned is the focus of a criminal investigation.²⁰ Where a defendant voluntarily arrived at a police station, was informed he was not under arrest, and left the police station without hindrance after an interview with police, the defendant’s freedom to depart was not restricted in any way, and defendant was not in custody for Miranda purposes.²¹

In this case, the initial interview was held outside Duarte’s home, with police questioning Duarte about his truck that he had reported stolen. Duarte’s alleged stolen truck was found in the same hotel parking lot where the getaway vehicle was abandoned. Both vehicles were “cold plated” whereby licenses plates belonging to other vehicles were fastened over the top of the vehicles’ actual licenses plates. Although the

¹⁷State v. Taylor, 114 Nev. 1071, 1081-82, 968 P.2d 315, 323 (1998).

¹⁸California v. Beheler, 463 U.S. 1121, 1125 (1983).

¹⁹Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

²⁰Taylor, 114 Nev. at 1082, 968 P.2d at 323.

²¹Oregon v. Mathiason, 429 U.S. 492, 495 (1977).

conversation became hostile, there is no evidence that Duarte was in any way restrained. The second interview, a few hours after the first, occurred after Duarte voluntarily went to the police station. After the interview, Duarte left without hindrance, and there is no evidence that Duarte's freedom was restrained during the interview.

A review of the "totality of the circumstances" test pursuant to Taylor suggests there was no custodial interrogation. The sites of the interrogation were Duarte's home and a police station. However, the State used no evidence from the first interview during the trial. The second interview, occurring at the stationhouse, was voluntary, and Duarte presented no evidence that his freedom was restricted, particularly since he left the station to meet his family after the interview. Consistent with the facts in Mathiason, Duarte was not in custody during the second interview.

Whether there were indicia of arrest present requires an analysis of the factors listed in Taylor including:

(1) whether the suspect was told that the questioning was voluntary or that he was free to leave; (2) whether the suspect was not formally under arrest; (3) whether the suspect could move about freely during questioning; (4) whether the suspect voluntarily responded to questions; (5) whether the atmosphere of questioning was police-dominated; (6) whether the police used strong-arm tactics or deception during questioning; (7) whether the police arrested the suspect at the termination of questioning.²²

²²114 Nev. at 1082, 968 P.3d at 323.

The record does not indicate Duarte was told the questioning was voluntary. Duarte was not formally under arrest at the time of questioning; however, during the initial interview, the police threatened to take him downtown for questioning. Duarte did not present any evidence that he was handcuffed or restrained and could not move about. The questioning officers never told Duarte he was not free to leave, and after the second interview, Duarte freely walked out of the police station. The second interview was clearly voluntary, as Duarte went to the station freely to answer questions, and the detective indicated he was cooperative during the interview. Both interviews occurred with police; however, Duarte does not point to any evidence that the interviews were “police-dominated.” At the conclusion of questioning, police did not arrest Duarte.

Under these facts, we conclude that Duarte was not in custody for purposes of Miranda, and the police questioning did not implicate his Fifth Amendment rights.

Substantial evidence to support the jury verdict

Finally, Duarte argues that the evidence presented against him was insufficient to satisfy the elements of the crimes charged beyond a reasonable doubt.

The test for evaluating a sufficiency of the evidence claim is not whether the reviewing court is convinced of the guilt of the defendant beyond a reasonable doubt,²³ rather “[w]here there is substantial evidence to support a verdict in a criminal case, the reviewing court will not disturb

²³Doyle v. State, 112 Nev. 879, 891, 921 P.2d 901, 910 (1996) overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004).

the verdict nor set aside the judgment.”²⁴ On appeal, “the issue is not whether this court would have found [the defendant] guilty, but whether the jury properly could.”²⁵

The jury convicted Duarte on conspiracy to commit robbery and/or murder, attempted murder with a deadly weapon, attempted robbery with the use of a deadly weapon, and possession of a stolen vehicle.

In order to prove conspiracy to commit robbery and/or murder, the State must prove that two or more people agreed to commit an illegal act.²⁶ It is uncontested that co-defendant Vigoa was one of the defendants involved in the robbery. The owner of Global Net Communications introduced evidence at trial that three phones were purchased under one name, Oscar Cisneros. Throughout the trial, the State presented receipts to prove phone numbers of the defendants, and then established that on the day of the robbery Duarte received ten phone calls from co-defendant Vigoa. Under these facts, a reasonable jury could conclude Duarte was acting in concert with Vigoa and Cisneros.

Attempted murder²⁷ is defined as “the performance of an act or acts which tend, but fail, to kill a human being, when such acts are done with express malice, namely, with the deliberate intention

²⁴Henry v. State, 83 Nev. 194, 196, 426 P.2d 791, 791 (1967); accord Washington v. State, 112 Nev. 1067, 1073, 922 P.2d 547, 551 (1996); Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981).

²⁵Anstedt v. State, 89 Nev. 163, 165, 509 P.2d 968, 969 (1973).

²⁶NRS 199.480, 200.010, 200.030, 200.380.

²⁷NRS 193.330, 193.165, 200.030.

unlawfully to kill.”²⁸ The three armored guards testified that the defendants came towards them with guns drawn and began firing rapidly at them. In addition, the State presented testimony that the bullets used in the attack could pierce body armor. This evidence could persuade a rational jury that the Duarte acted with malice and the intent to kill.

To prove attempted robbery,²⁹ the State demonstrated the defendants’ intentions were to rob the Brinks armored car. The State established that the defendants carried a Glock pistol. Witnesses who saw the robbery occur testified regarding the events they observed. Physical evidence, including bullet fragments, shell casings, and the weapons themselves were introduced. A reasonable jury could conclude Duarte was guilty of attempted robbery with the use of a deadly weapon.

To prove possession of a stolen vehicle,³⁰ the State introduced evidence that the SUV used as the getaway car was stolen. The getaway SUV was abandoned at the same location where Duarte’s car was parked. The State also produced Duarte’s DNA evidence found on a water bottle located inside the stolen SUV. An eyewitness placed Duarte where the stolen getaway vehicle was deserted. Based on this evidence, a reasonable jury could have concluded Duarte was guilty of possession of a stolen vehicle.

In addition to specific physical evidence, the State produced circumstantial evidence that supports the conclusion reached by the jury. Duarte cannot account for 19 hours of his life, including the day of the

²⁸Keys v. State, 104 Nev. 736, 740, 766 P.2d 270 (1988).


²⁹NRS 193.330, 200.380, 193.165.


³⁰NRS 205.273.

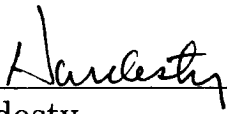
robbery. Also on the day of the robbery, Duarte was in phone contact with his co-defendant 10 times and reported his car stolen. Duarte's fingerprint was found on the cold plated license plate on his vehicle.

The physical and circumstantial evidence in this case constitutes substantial evidence to support the jury verdict. Therefore, we will not disturb the judgment of conviction.

Accordingly, we ORDER the judgment of the district court AFFIRMED.


_____, J.
Rose


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Kathy A. Hardcastle, District Judge
Michael V. Cristalli
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk