IN THE SUPREME COURT OF THE STATE OF NEVADA

CRYSTAL LOUISE ARCHULETA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42803

FILED

AUG 11 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of felony DUI. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

Appellant Crystal Archuleta makes eight claims of error in this appeal of her conviction. We conclude that six of her claims of error are without merit. Finding only harmless error as to the remaining issues, we affirm the conviction.

Sufficient evidence to bind over

Archuleta claims the district court erred in denying her pretrial writ petition, arguing the case should not have been bound over on the theory of intoxication by drugs in combination with alcohol. The State responds that sufficient proof was provided.

Probable cause to support a criminal charge "may be based on slight, even 'marginal' evidence."[1] The statute at issue here provides for

[1]Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (citing Sheriff v. Badillo, 95 Nev. 593, 600 P.2d 221 (1979); Perkins v. Sheriff, 92 Nev. 180, 547 P.2d 312 (1976)).

violations based on consumption of alcohol,[2] a controlled substance,[3] a combination of alcohol and controlled substance,[4] or a prohibited substance.[5] The specific subsections of the statute that delineate the different substances list those substances in an "and/or" fashion. Archuleta was charged in the amended complaint with violation of NRS 484.379.[6] Therefore, slight or marginal evidence of a violation of any one of the subsections was sufficient for Archuleta to be bound over. The record shows sufficient evidence to bind over Archuleta on a charge of driving under the influence of alcohol. Thus, the district court did not err in denying the petition for writ of habeas corpus.

Admission of evidence of prescription drugs

Archuleta contends the evidence of prescription drugs in her system should have been suppressed, because the information was obtained from a questionnaire Archuleta filled out at the jail without waiving her Miranda v. Arizona[7] rights.

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[2]NRS 484.379(1).

[3]Id. at (2)(a).

[4]Id. at (2)(b).

[5]Id. at (3).

[6]The amended complaint also included NRS 484.3792(1)(c), the enhancement statute, since Archuleta had two prior DUI convictions.

[7]384 U.S. 436 (1966).

In Nika v. State, this court held admissible a suspect's answer to a routine jail questionnaire.[8] This court held the questionnaire was not considered custodial interrogation, because the questions were asked of every prisoner, and the purpose of the question was the safety of prisoners in custody.[9]

Here, the purpose of the routine booking questions asked of Archuleta was the safety and health of the prisoners. Under Nika, such questions are not part of custodial interrogation, and no Miranda warnings are required. Therefore, the district court did not abuse its discretion in admitting testimony about Archuleta's prescription drug use.

Blood test results

Archuleta contends the district court erred in not suppressing blood test results, arguing she was not provided with a "real choice" between blood and breath testing. Archuleta bases this argument on the fact that she was not offered the choice until she and the arresting officer had left the jail and were already at the hospital. Because the breath analyzer was at the jail, Archuleta claims the officer could not have known if it was even available.

The record here is clear that Officer Spring expressly offered Archuleta a choice of breath test or blood test, and that Archuleta chose a blood test. We conclude appellant's arguments are without merit.

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[8]113 Nev. 1424, 951 P.2d 1047 (1997).

[9]Id. at 1439, 951 P.2d at 1057.

Police/prosecution misconduct

Archuleta contends the district court erred in denying her motion to dismiss based on the misconduct of Officer Kidd, imputed to the prosecution, during his investigation and questioning of Archuleta's sister. Archuleta argues Kidd's behavior rose to the level of misconduct sufficient to mandate dismissal, claiming that it was intentional misconduct when Kidd asked Archuleta's sister not to mention their previous affair during her interview with prosecutors. Archuleta further contends the district court erred in suppressing testimony of Kidd's alleged misconduct, claiming the decision essentially rewarded Kidd for his misconduct.

The State argues that Archuleta failed to show any prejudice from the alleged misconduct, or from Kidd's participation in the investigation and trial. Further, the State contends that Kidd's affair with Archuleta's sister had nothing to do with the case, and was correctly ruled irrelevant and inadmissible at trial.

This court reviews the denial of motions to dismiss under an abuse of discretion standard.[10] Additionally, disqualification of the prosecutor's office lies within the sound discretion of the district court.[11] The trial court "should consider all the facts and circumstances and determine whether the prosecutorial function could be carried out impartially[.]"[12] Disqualification may be appropriate "in extreme cases where the appearance of unfairness or impropriety is so great that the

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[10]State v. Babayan, 106 Nev. 155, 171, 787 P.2d 805, 817 (1990).

[11]Collier v. Legakes, 98 Nev. 307, 309, 646 P.2d 1219, 1220 (1982).

[12]Id. at 310, 646 P.2d at 1220.

public trust and confidence in our criminal justice system could not be maintained without such action."[13]

The district court here heard extensive testimony regarding the allegations, and found nothing that suggested such a level of impropriety. The record shows both Kidd and Archuleta's sister testified that the relationship had no effect on the case. There is no evidence in the record to support the contention that the district court abused its discretion in denying both the motion to dismiss and the motion for recusal.

As for the exclusion of testimony about the relationship between Kidd and Davis, again the trial court heard testimony and argument from both sides, and determined the evidence was irrelevant. The record supports that finding. This court will not overturn a district court's decision to admit or exclude evidence unless there has been an abuse of discretion.[14] We conclude the district court did not abuse its discretion.

Officer opinion testimony

Archuleta argues the district court erred in allowing Officer Spring to testify as to his opinion of the intoxication of Archuleta, claiming this essentially allowed a non-expert witness to testify as an expert. The State contends that Spring's testimony was permitted under NRS 50.265, since his opinions were relevant and helpful to the jury.

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[13]Id. at 310, 646 P.2d at 1221.

[14]Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000).

NRS 50.265 limits opinion or inference testimony of non-expert witnesses to that which is "rationally based on the perception of the witness,"[15] and "[h]elpful to a clear understanding of his testimony or the determination of a fact in issue."[16]

This court has held the admissibility and competency of opinion testimony, both expert and non-expert, "is largely discretionary with the trial court."[17] This court has upheld a trial court's admittance of opinion testimony of police officers where that testimony met the statutory requirements of NRS 50.265.[18]

Here, Officer Spring did not testify as an expert. Spring's testimony about his opinion of Archuleta's intoxication was rationally based on his observations of her field sobriety test. Archuleta's intoxication was most definitely a fact in issue. Therefore, Spring's testimony met the criteria for such testimony under NRS 50.265, and the district court did not abuse its discretion in allowing it.

Use of prior convictions

Archuleta claims the district court erred in not permitting the defense to present evidence of Archuleta's prior DUI convictions. She contends she was prevented from presenting a defense theory that Archuleta's and Reed's knowledge of her priors bolstered their testimony

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[15]NRS 50.265(1).

[16]Id. at (2).

[17]Watson v. State, 94 Nev. 261, 264, 578 P.2d 753, 756 (1978) (citing State v. Crook, 565 P.2d 576 (Idaho 1977).

[18]Collins v. State, 113 Nev. 1177, 1184, 946 P.2d 1055, 1060 (1997).

that Reed, not Archuleta, was driving the van. The State contends that NRS 484.3792(2) prohibits such testimony, and thus the district court acted properly in excluding it.

NRS 484.3792(2) provides, in pertinent part, that

> The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be proved at the time of sentencing and, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination or presented to the grand jury.

A defendant is generally permitted to waive fundamental rights, including the right to a preliminary hearing as required in NRS 484.3792(2).[19] However, in Goldstein v. Pavlikowski, this court held that a defendant in a capital case did not have the right to waive a jury trial and compel a trial by judge, because the jury trial statute did not contain a provision allowing for such a waiver.[20]

The statute compelling exclusion of prior DUI convictions does not contain a waiver clause. Additionally, the statute provides rights that are arguably solely for the protection of the defendant. In such a case the defendant is entitled to make a voluntary, knowing waiver of such protections. Although the district court erred in not permitting Archuleta to waive the protections of NRS 484.3792(2), Archuleta must show

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[19]Krauss v. State, 116 Nev. 307, 310, 998 P.2d 163, 165 (2000); see also Hodges v. State, 119 Nev. 479, 78 P.3d 67 (2003) (permitting defendant to stipulate or waive proof of prior convictions for purposes of habitual criminal status at sentencing).

[20]87 Nev. 512, 514-15, 489 P.2d 1159, 1161 (1971) (citing NRS 175.011, which permits waiver of jury trial except in capital cases).

prejudice from this error to warrant reversal.[21] In determining such prejudice, this court considers "whether the issue of innocence or guilt is close, the quantity and character of the error and the gravity of the crime charged."[22]

There was testimony from witnesses that Archuleta was driving, as well as conflicting testimony, primarily from Reed and Archuleta herself, that she was not driving. The testimony of Reed, the primary witness Archuleta intended to use as to knowledge of her prior DUI convictions, was subject to severe credibility issues, because he testified that he was the one who drove the van that day, yet stood silently by and allowed the police to arrest Archuleta for DUI. We can reasonably conclude from the verdict that the jury did not believe the testimony of Reed, and the addition of testimony that he knew of her prior DUI convictions would not have enhanced his credibility. Thus, although the district court's failure to allow Archuleta to waive the protections of NRS 484.3792(2) was error, we conclude the error was harmless.

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[21]Lobato v. State, 120 Nev. ____, ____, 96 P.3d 765, 772 (2004).

[22]Smith v. State, 111 Nev. 499, 506, 894 P.2d 974, 978 (1995) (citing Big Pond v. State, 101 Nev. 2, 692 P.2d 525 (1985)); see also Lobato, 120 Nev. at ____, 96 P.3d at 772 ("[E]xclusion of a witness' testimony is prejudicial if there is a reasonable probability that the witness' testimony would have affected the outcome of the trial[,]"quoting Bell v. State, 110 Nev. 1210, 1215, 885 P.2d 1311, 1315 (1994)).

Verdict form

Archuleta claims the district court erred in not allowing a proposed defense jury verdict form which required the jury to indicate which theory of DUI any finding of guilt was based on. Archuleta cites Geary v. State,[23] apparently for the proposition that in a capital case, the jury must identify each aggravating circumstance, and a finding of any aggravating circumstance must be unanimous. Archuleta admits, and the State concurs, however, that under Mason v. State, the jury need not agree on a theory of guilt.[24]

The proposed jury verdict form instructed the jury to check which theory(ies) of guilt applied, and listed four possibilities:

> a. Was under the influence of intoxicating liquor;
>
> b. Had a 0.10% or more, by weight of alcohol in the defendant's blood;
>
> c. Had 0.10 percent or more by weight of alcohol in his blood within two hours; or
>
> d. Was under the combined influence of intoxicating liquor or a controlled substance

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[23]114 Nev. 100, 952 P.2d 431 (1998).

[24]118 Nev. 554, 558, 51 P.3d 521, 524 (2002) (citing Walker v. State, 113 Nev. 853, 870, 944 P.2d 762, 773 (1997)). See also Gordon v. State, 121 Nev. ____, ____ P.3d ____ (Adv. Op. No. 51, August 11, 2005).

> After driving or being in actual physical control of a vehicle on a highway or on premises to which the public has access.[25]

The verdict form eventually given to the jury was a simple statement of guilt as to "Count 1: Driving under the influence."

The transcript of settlement of jury instructions was not included in the record; therefore we have no way of knowing defense counsel's argument for inclusion of the above instruction. However, under this court's precedent in Mason and Gordon, because the jury need not be instructed to agree on a specific theory of guilt, the verdict form given was proper, and the district court did not err in refusing Archuleta's proposed verdict form.

Affirmative defense jury instruction

Appellant argues it was error for the district court to refuse the defense's proposed jury instruction as to Archuleta having consumed enough alcohol to be found impaired after driving. The State contends that there was no error because Archuleta's theory was that she was not driving. Further, the State argues that the affirmative defense of drinking after driving is only proper if the defendant first admits the fact of driving. Because Archuleta denied driving, the State contends, she was not entitled to an instruction as to the affirmative defense.

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[25]This language does not correspond to any of the applicable statutes; it appears to be a combined and edited version of some of the provisions of NRS 484.379(1)(a), (1)(b), (1)(c), and (2)(b).

NRS 484.379(4) permits an affirmative defense of drinking after driving:

> If consumption is proven by a preponderance of the evidence, it is an affirmative defense under paragraph (c) of subsection 1 that the defendant consumed a sufficient quantity of alcohol after driving or being in actual physical control of the vehicle, and before his blood or breath was tested, to cause him to have a concentration of alcohol of 0.10 or more in his blood or breath. A defendant who intends to offer this defense at trial or preliminary hearing must, not less than 14 days before trial or hearing or at such other time as the court may direct, file and serve on the prosecuting attorney a written notice of that intent.

A defendant is entitled to have the jury instructed as to her theory of the case. "However, an instruction need not be given unless there is supportive evidence."[26]

The proposed instruction read as follows:

> It is an affirmative defense to the charge that the defendant consumed a sufficient quantity of alcohol to cause the intoxication or (sic) .10 or higher reading after she was alleged to have been driving or in actual physical control of the vehicle.
>
> In order to refute this affirmative defense the prosecution must show beyond a reasonable doubt that the affirmative defense does not apply.

Archuleta notified the State more than 14 days before trial, as called for in NRS 484.379(4), that she intended to assert the affirmative defense. There is some evidence in the record to support Archuleta's contention that she drank only after she arrived at Reed's house.

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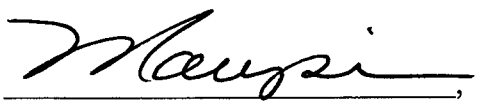
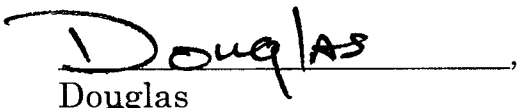
[26]Owens v. State, 96 Nev. 880, 884, 620 P.2d 1236, 1239 (1980) (citing Riddle v. State, 96 Nev. 589, 613 P.2d 1031 (1980)).

Therefore, we conclude that the district court erred in refusing to allow the defense to instruct the jury as to one of the theories of defense. However, several witnesses testified that Archuleta drank before the trip in the van. Further, it stretches the bounds of credibility for Archuleta to argue she drank enough alcohol to reach a blood concentration of 0.10 after what witnesses testified was just a few minutes between arriving at the home and being arrested by the police. We therefore conclude that the jury instruction error was harmless. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Maupin



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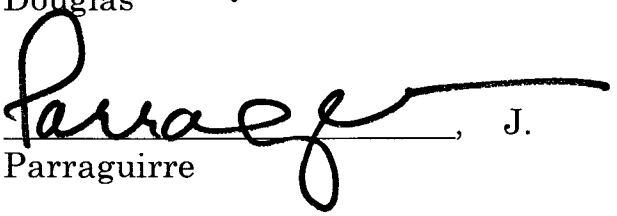

_____, J.
Parraguirre

cc: Hon. Andrew J. Puccinelli, District Judge
Elko County Public Defender
Attorney General Brian Sandoval/Carson City
Elko County District Attorney
Elko County Clerk