IN THE SUPREME COURT OF THE STATE OF NEVADA

ENCARNACION AGUILAR,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42807

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of transporting a controlled substance and one count of trafficking in a controlled substance. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge. The district court sentenced appellant: for transporting a controlled substance, to a prison term of 12 to 48 months; and for trafficking, to a concurrent prison term of 120 to 300 months. The district court further ordered appellant to pay a fine in the amount of $250,000.00.

Appellant first contends that the State was barred from seeking an indictment after the case was dismissed by the justice of the peace.[1] We conclude that, based on the facts in this case, there is no evidence that the prosecutor willfully failed to comply with procedural rules or acted with conscious indifference. In particular, we note that the missing witness for the State had been subpoenaed, but did not appear at the preliminary hearing because he had traveled out of state to be with his

[1]See, e.g., Sheriff v. Blackmore, 99 Nev. 827, 829, 673 P.2d 137, 138 (1983) ("where the magistrate properly dismisses the criminal proceeding at the preliminary examination, and the prosecution has acted in a willful or consciously indifferent manner, further prosecution is barred").

mother, who was gravely ill.[2] We therefore conclude that this contention is without merit.

Appellant next contends that his right to a speedy trial was violated. In assessing a claim that a defendant has been deprived of his constitutional right to a speedy trial, the court must weigh four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant.[3] The four "factors must be considered together, and no single factor is either necessary or sufficient."[4] But the length of the delay must be at least presumptively prejudicial before further inquiry into the other factors is warranted.[5]

In this case, there was a delay of six years before appellant went to trial. The reason for the bulk of the delay, however, was that appellant fled the jurisdiction and was apparently deported. Appellant did not assert his speedy trial rights until five years after his arrest, and any delay after that was directly attributable to pre-trial motions filed by appellant. Finally, appellant has not even alleged that he was prejudiced by the delay. After considering the four factors, we conclude that appellant was not deprived of his right to a speedy trial.

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[2]See Bustos v. Sheriff, 87 Nev. 622, 491 P.2d 1279 (1971) (holding that there is no prosecutorial abuse where a subpoenaed witness is unexpectedly absent at the preliminary hearing).

[3]Barker v. Wingo, 407 U.S. 514, 530-33 (1972).

[4]Sheriff v. Berman, 99 Nev. 102, 107, 659 P.2d 298, 301 (1983).

[5]Barker, 407 U.S. at 530.

Appellant next contends that he did not validly consent to a patdown search, and the drugs found on his person should therefore have been suppressed. Specifically, appellant argues that when the officers boarded the bus on which appellant was a passenger, they made an announcement in English that passengers did not have to speak to the officers, and that appellant did not understand that he could refuse contact with the officers. At the evidentiary hearing, one of the officers testified that he was fluent in Spanish and that he spoke with appellant in Spanish.

The district court found that appellant's testimony regarding the search was not credible. The district court therefore found that appellant's consent was valid. "Findings of fact in a suppression hearing will not be disturbed on appeal if supported by substantial evidence."[6] We conclude that the district court's finding that the consent was voluntary is supported by substantial evidence, and appellant has failed to demonstrate that the district court erred.

Finally, appellant contends that, although he was given Miranda[7] warnings, he was not specifically asked whether he was willing to waive his right to an attorney and the right to remain silent. A waiver of Miranda rights need not be explicit, but may be inferred from "the particular facts and circumstances surrounding [the] case."[8] In this case,

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[6]State v. Johnson, 116 Nev. 78, 80, 993 P.2d 44, 45-46 (2000).

[7]Miranda v. Arizona, 384 U.S. 436 (1966).

[8]Edwards v. Arizona, 451 U.S. 477, 482 (1980); see also United States v. Cazares, 121 F.3d 1241, 1244 (9th Cir. 1997) (holding that to solicit a waiver of Miranda rights, a police officer need neither use a

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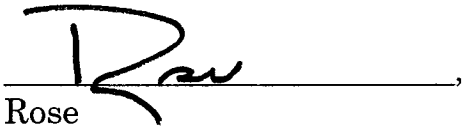
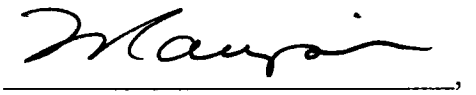
appellant was informed of his rights, and explicitly acknowledged that he understood his rights. After this acknowledgement, when asked by the officer, appellant stated that he was willing to answer some questions. We therefore conclude that appellant's waiver of rights was voluntarily made. Accordingly, the district court did not err by denying appellant's motion to suppress.

Having considered appellant's contentions and concluded that they are without merit, we

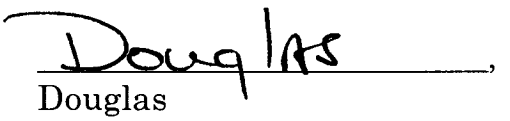
ORDER the judgment of conviction AFFIRMED.



_____, J.
Rose



_____, J.
Maupin



_____, J.
Douglas

cc: Hon. Michael A. Cherry, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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waiver form nor ask explicitly whether the defendant intends to waive his rights).