IN THE SUPREME COURT OF THE STATE OF NEVADA

SHERIFF, CLARK COUNTY,
Appellant,
vs.
GREGORY SCOTT JONES AND ROVELYN ABAN,
Respondents.

No. 42831

FILED

MAY 12 2005

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

ORDER OF AFFIRMANCE

This is a Sheriff's appeal from an order of the district court granting pretrial petitions for writs of habeas corpus. Eighth Judicial District Court, Clark County; Michael A. Cherry, Judge.

On May 13, 2001, respondents Gregory Scott Jones and Rovelyn Aban returned home from shopping with Aban's five-year-old daughter, Annalyn Aban. Jones and Aban were relaxing in their living room when Annalyn told them that she wanted to go swimming. Jones told Annalyn to get her swimsuit on. Annalyn subsequently went into the backyard, fell into the pool, and drowned.

Later that day, Sara Mildebrandt, a part-time investigator with the Clark County Coroner's Office, was assigned to investigate this case. Jones told Investigator Mildebrandt what had happened and that Annalyn did not know how to swim. After Investigator Mildebrandt completed questioning Aban and Jones, she retrieved Annalyn's bathing suit for evidentiary purposes. Investigator Mildebrandt also examined Annalyn's body, and noted that Annalyn was well-nourished and that her body showed no evidence of trauma.

On May 14, 2001, Dr. Lary Simms, a forensic pathologist for the Clark County Coroner's office, performed an autopsy on Annalyn. Dr.

Simms determined there were no injuries to Annalyn's head, neck or throat. Based on this evidence, Dr. Simms opined that Annalyn's death was the result of accidental drowning.

On September 20, 2001, the State charged Aban and Jones in a criminal complaint with one count of child abuse and neglect resulting in substantial bodily harm and one count of involuntary manslaughter. On July 31, 2002, the justice court conducted a preliminary hearing on this matter. On February 24, 2003, the State amended its complaint to correct the alleged victim's name. The next day, the State filed a motion with the justice court to bind the proceedings over to the district court. On June 9, 2003, after hearing arguments from Aban, Jones, and the State, the justice court bound the case over to district court.

On June 10, 2003, the State filed a criminal information. On September 15, 2003, Aban filed a petition for a writ of habeas corpus, alleging that the evidence provided during the preliminary hearing was insufficient to establish probable cause. Jones similarly filed a petition for a writ of habeas corpus on September 25, 2003. On January 16, 2004, the district court conducted a hearing on the petitions for writs of habeas corpus and determined that there was insufficient probable cause to believe that Aban or Jones committed any crimes. The State appeals, arguing that the district court erred in granting the petitions for writs of habeas corpus. We disagree.

DISCUSSION

Pretrial petitions for writs of habeas corpus

Standard of review

NRS 171.206 requires a "magistrate to hold an accused to answer in the district court if from the evidence produced at the preliminary examination it appears . . . 'that there is probable cause to

believe that an offense has been committed and that the defendant has committed it.'"[1] "[T]he [district] court can only inquire into whether there exists any substantial evidence which, if true, would support a verdict of conviction. The court may not resolve a substantial conflict in the evidence because that is the exclusive function of the jury."[2]

In determining whether there is "sufficient independent evidence of the corpus delecti, a reviewing court should assume the truth of the state's evidence and all reasonable inferences from it in a light most favorable to the state."[3] "Probable cause to bind a defendant over for trial may be based on slight, even marginal, evidence because it does not involve a determination of guilt or innocence of an accused."[4] "Absent a showing of substantial error on the part of the district court in reaching [factual] determinations, this court will not overturn the granting of pretrial habeas corpus petitions for lack of probable cause."[5]

Sufficient evidence of abuse and neglect

The State argues that it presented sufficient evidence to support charges of abuse and neglect pursuant to NRS 200.508. We disagree.

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[1]Graves v. Sheriff, 88 Nev. 436, 439, 498 P.2d 1324, 1326 (1972) (quoting NRS 171.206).

[2]Sheriff v. Dhadda, 115 Nev. 175, 180, 980 P.2d 1062, 1065 (1999) (internal citations omitted). See also Sheriff v. Medberry, 96 Nev. 202, 203-04, 606 P.2d 181, 182 (1980).

[3]Dhadda, 115 Nev. at 180, 980 P.2d at 1065.

[4]Id.

[5]Sheriff v. Provenza, 97 Nev. 346, 347, 630 P.2d 265, 265 (1981).

NRS 200.508(1) provides that "[a] person who willfully causes a child . . . to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect . . . is guilty of a category B felony." The statute defines "abuse or neglect" as "negligent treatment or maltreatment of a child under the age of 18 years, as set forth in . . . [NRS] 432B.140."[6] In relevant part NRS 432B.140 states that negligent treatment or maltreatment of a child occurs when "a child . . . is without proper care, control and supervision or lacks . . . other care necessary for the well-being of the child because of the . . . neglect or refusal [of the person responsible for the child's welfare] to provide them when able to do so." Consequently, to prevail, the State needed to provide specific evidence that Aban and Jones willfully or negligently caused injury or harm to Annalyn.

In the instant case, the facts indicate that neither Aban nor Jones willfully or negligently caused harm or injury to Annalyn. Both Aban and Jones told the investigator that Annalyn had been outside for approximately five minutes when they went to search for her. Additional evidence indicated that only two or three minutes elapsed from the time Annalyn went into the backyard to when Aban found her in the pool.

The State contends that the short time period of three minutes does not negate the charge of neglect. To support its contention, the State relies heavily on Noonan v. State.[7]

In Noonan, Eric Paul Noonan was watching sixteen-month-old Taylor at his home and gave her a bath at approximately 10:45 a.m.

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[6]NRS 200.508(4)(a).

[7]115 Nev. 184, 980 P.2d 637 (1999).

"While Taylor was in the bathtub, Noonan left to pick-up another child at the child's school."[8] About twenty minutes later, Noonan returned home and discovered Taylor "in the bathtub floating on her back."[9] Initially, Noonan lied to the police about what his real name was and the circumstances surrounding Taylor's death. A jury convicted Noonan of second degree murder and sentenced him to twenty-five years in prison. Noonan appealed his judgment of conviction.[10] We concluded that "leaving a sixteen-month old child alone in a bathtub for twenty-five to thirty minutes is inherently dangerous and Noonan should have foreseen the possibility of death or injury resulting."[11]

Noonan, however, is distinguishable from the case at bar. Here, Annalyn was five years old, whereas the child in Noonan was only sixteen months old. Aban and Jones instructed Annalyn to get her swimsuit on; they did not, however, permit her to go swimming by herself. In Noonan, Noonan left Taylor in a bathtub full of water for thirty minutes.[12] In the instant case, Aban and Jones did not place Annalyn in the swimming pool; instead, they expected her not to go into the pool until they came into the backyard. Distinguishable from Noonan, Aban and Jones did not leave Annalyn unattended in the pool for thirty minutes or even fifteen minutes. Aban and Jones left Annalyn unattended for up to

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[8]Id. at 187, 980 P.2d at 638.

[9]Id.

[10]Id. at 185, 980 P.2d at 637.

[11]Id. at 189, 980 P.2d at 640.

[12]Id.

five minutes. Five minutes is a substantially different length of time than thirty minutes or longer. Because the facts of Noonan are so distinguishable from the instant case, we conclude that the State's reliance on Noonan is inapposite.

In addition to Aban's and Jones' statements that they did not willfully harm Annalyn or place her in harm's way, Dr. Simms, who performed the autopsy on Annalyn, stated that Annalyn's body had no evidence of physical abuse. Annalyn had no bruising, no neck injuries, and no head injuries. Investigator Mildebrandt also concluded that there was no evidence of child abuse in this case; rather, Investigator Mildebrandt concluded that Annalyn was well nourished and had no evidence of trauma on her body. Therefore, the State failed to produce sufficient evidence, as required by NRS 200.508(1), that Aban or Jones willfully caused harm or injury to Annalyn.

The facts of this case also indicate that Annalyn's death was not intentional, but accidental. In his official report, Dr. Simms opined that Annalyn's death was an accident. After reviewing the autopsy report, Investigator Mildebrandt also stated that Annalyn's death was an accident. The overwhelming evidence indicates that Annalyn's death was completely accidental in nature. Therefore, the district court properly granted Aban's and Jones' petitions for writs of habeas corpus because there was insufficient probable cause to establish child abuse and neglect.

Sufficient evidence of involuntary manslaughter

The State argues that it presented sufficient evidence to support charges of involuntary manslaughter pursuant to NRS 200.070. We disagree.

NRS 200.070 provides that "involuntary manslaughter is the killing of a human being, without any intent to do so, in the commission of

an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner." In order for the State to establish sufficient evidence that Aban and Jones committed the crime of involuntary manslaughter, it must show that Aban and Jones committed either (1) an unlawful act that resulted in Annalyn's death, or (2) a lawful act that likely would produce Annalyn's death.

In the case at bar, the State presented no evidence that Aban or Jones committed an unlawful act that led to Annalyn's death. After Annalyn received permission to put on her swimsuit, she wandered off on her own. Evidence at the preliminary hearing indicated that Aban and Jones left Annalyn in the backyard for two to three minutes. No evidence was admitted that indicated Aban or Jones gave Annalyn permission to go swimming by herself. The State presented no evidence that Aban and Jones left Annalyn unattended for a substantial period of time, as in Noonan. We conclude that Annalyn's death was an accident, not the result of an unlawful act.

Annalyn's death was also not the result of a lawful act likely to produce a death because leaving a five-year-old child unattended for three to five minutes would not likely result in death. Additionally, the district court was in the best position to determine whether the State presented sufficient evidence and whether probable cause existed for prosecution. We have held that "[t]he trial court is the most appropriate forum in which to determine factually whether or not probable cause exists."[13] The district court reviewed the facts and relevant law in this case, heard the witnesses' testimony, and concluded that there was no

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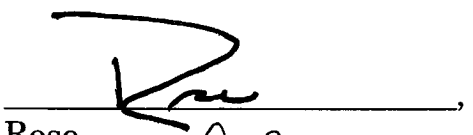
[13]Sheriff v. Provenza, 97 Nev. 346, 347, 630 P.2d 265, 265 (1981).

probable cause to believe Aban or Jones committed any crime. Therefore, the district court properly granted Aban's and Jones' petitions for writs of habeas corpus.

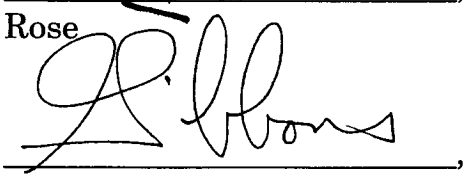
CONCLUSION

We conclude that the district court did not err in granting Jones' and Aban's petitions for writs of habeas corpus. There was no probable cause that they willfully abused or neglected Annalyn, nor did the State present sufficient evidence that they committed involuntary manslaughter. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose



_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Michael A. Cherry, District Judge
Attorney General Brian Sandoval/Carson City
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Thomas F. Pitaro
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